Supreme Court, U.S.
FILED
JUL 29 1993
OFFICE OF THE CLERK

No. 92-1546

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 23, 1993
CERTIORARI GRANTED ———— 1993

BEST AVAILABLE COPY

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-88-61

IRVINE, JOHN O., FIRST TRUST NATIONAL ASSOCIATION
a national banking corporation, as co-personal representative of the Estate of Sally O. Irvine

v.

UNITED STATES OF AMERICA

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
		John O. Irvine vs. United States of America
2-4-88	1	**COMPLAINT. Summons issued.**
		SUMMONS RETURNED SERVED *2-4-88*
		CASE ASSIGNED TO JUDGE MAGNUSON per Master List #116.
2-11-88	2	**SUMMONS RETD. SERVED by Certified Mail 2-4-88. (pk)**
4-4-88	3	**U.S. MOTION FOR ENLARGEMENT OF TIME, W/DECLARATION OF THOMAS D. SYKES. (pk)**
4-6-88	4	**ORDER (PAM/4-5-88) that U.S. shall have through 5-5-88 to file a response to serve/file a response to complaint. cc:attys (pk)**
5-5-88	5	**UNITED STATES' *ANSWER*. (pk)**

DATE	NR.	PROCEEDINGS
7-21-88	6	MINUTES (FEB) SCHEDULING CONFERENCE. (pk)
7-22-88	7	ORDER (FEB) that all TP action shall be authorized/commenced by 10-3-88; amendments to pleadings shall be authorized/filed by 12-1-88; discovery shall be completed on/before 2-1-89; non-dispositive motions shall be heard on/before 2-15-89; dispositive motions shall be filed/noticed/served on/before 3-1-89; this case shall commence trial upon further order of the court. cc:attys (pk)
2/2/89	8	STIPULATION AND ORDER (FEB, 2/1/89) amending scheduling order of 7/27/88: with cert. exceptions, discovery extended to 4/1/89 for certain depositions; non-disp. motions shall be heard on or before 4/15/89 with exceptions; disp. motions shall be filed, notice and served on or before 5/1/89; and that trial shall commence upon further order of the court. cc: attys (p5)
3-23-89	9	DEFTS NOTICE OF TAKING DEPOSITIONS OF COLE OEHLER at 12:00 Noon; ERNST & WHINNEY at 2:00 p.m., HARRY L. BOLTZ at 3:30 p.m., on March 29, 1989 and JOHN L. JERRY at 8:30 a.m.; JOHN G. ORDWAY, III at 1:00 p.m.; & JOHN G. ORDWAY, JR. at 3:30 pm. on March 30, 1989 in St. Paul, MN (jf)
	10	DEFTS NOTICE OF TAKING DEPOSITION OF JOHN O. IRVINE on 3-30-89 at 2:00 p.m., in St. Paul, MN (jf)
	11	DEFTS NOTICE OF TAKING DEPOSITION OF FIRST TRUST N.A., on 3-30-89 at 10 a.m., in St. Paul, MN (jf)

DATE	NR.	PROCEEDINGS
3-24-89	12	PLTFS NO/MO FOR PROTECTIVE ORDER, Ret. before FEB on 4-7-89 at 10:00 am. W/AFF. of Mary J. Streitz. (pk)
4/3/89	13	PLTFS NOTICE OF MOTION AND MOTION to compel discovery ret. 4/14/89 at 9:00 a.m. before Magistrate Boline. (ps)
	14	AFFIDAVIT of Mary J. Streitz. (ps)
	15	PLTFS AMENDED NOTICE OF MOTION AND MOTION for protective order ret. 4/14/89 at 9:00 a.m. before Magistrate Boline. (ps)
4/7/89	16	Affidavit of Thomas D. Sykes. (ps) [SEPARATE]
	17	AFFIDAVIT of Mary J. Streitz. (ps)
FOLDER II:		
1/14/89	II-18	MINUTES (FEB) Pltf's motions for protective order, to compel, and for additional time to take depositions—taken under advisement. (ps)
4/27/89	II-19	NOTICE OF MOTION AND MOTION of pltfs' for summary judgment ret. 6/16/89 at 9:00 a.m. before Judge Magnuson. (ps)
5/1/89	II-20	NOTICE OF MOTION AND MOTION of USA for summary judgment ret. 6/16/89 at 9:00 a.m. before Judge Magnuson. (ps)
6/1/89	II-21	MEMORANDUM OPINION AND ORDER (FEB, 5/31/89) re discovery. (ps)
6/6/89	II-22	AMENDED NOTICE OF TAKING DEPOSITION of Harry L. Boltz and John L. Jerry, Ernst & Whinney. John G. Ordway III, and John G. Ordway III. (ps)

DATE	NR.	PROCEEDINGS
	II-23	AMENDED NOTICE TO TAKE DEPOSITION of First Trust National Association. (ps)
6/8/89	II-24	AMENDED NOTICE OF TAKING DEPOSITION of John O. Irvine on 6/14/89. (ps)
6/13/89	II-25	NOTICE OF MOTION AND MOTION of USA for reconsideration of order time in which to conduct certain discovery ret. —— before Magistrate Boline. (ps)
	II-26	DECLARATION of Thomas D. Sykes. (ps)
6/19/89	II-27	ORDER (FEB, 6/16/89) that deft. may take any depositions of the five non-resident attorneys on or before 7/10/89. cc: attys (ps)
6/23/89	II-28	AMENDED NOTICE OF UNITED STATES' FOR PARTIAL SUMMARY JUDGMENT, RET. 7-14-89 at 11:00 A.M. before PAM, with Declaration of Thomas D. Sykes. (cf)
	II-29	NOTICE OF MOTION AND MOTION of pltfs for summary judgment on 7/14/89 at 11:00 a.m. before Judge Magnuson. (ps)
	II-30	AFFIDAVIT of John G. Ordway, Jr. (ps)
	II-31	AFFIDAVIT of John L. Jerry. (ps)
	II-32	AFFIDAVIT of Mary J. Streitz. (ps) [SEPARATE]
7/14/89	II-33	MINUTES (PAM/E. Anderson) cross motions for summary judgment taken under advisement. (ps)
7/28/89	II-34	NOTICE OF MOTION AND MOTION of pltfs. for enforcement of order compelling discovery and for sanctions ret. 8/11/89 at 9:00 a.m. before Magistrate Boline (ps)

DATE	NR.	PROCEEDINGS
	II-35	AFFIDAVIT of Mary J. Streitz. (ps) [SEPARATE]
8/2/89	II-36	AMENDED NOTICE OF MOTION AND MOTION of pltfs. for enforcement of order compelling discovery and for sanctions ret. 8/15/89 before Magistrate Boline. (ps)
8/11/89	II-37	DECLARATION of John D. MacEachen. (ps)
	II-38	DECLARATION of Thomas D. Sykes. (ps)
8/15/89	II-39	MINUTES (FEB) pltfs' motion to enforce order compelling discovery and for sanctions taken under advisement. (ps)
9/1/89	II-40	ORDER (FEB, 8/31/89) that deft. shall produce a document. In all other respects, pltfs' motion is denied. cc: attys ps)
09/18/89	II-41	MEMORANDUM & ORDER (PAM 9/18/89) that pltff's motion for summary judgment is GRANTED; deft's motion for summary judgment is DENIED. W/i 20 days for the date of this order, pltffs shall submit a statement of the amt of refund they seek, including accrued interest, claims for fees & costs. The deft shall have 10 days w/i which to respond (cc:attys) dd 10 pgs
9/27/89	II-42	STATEMENT of pltf. of amount of refund sought. (ps)
10/10/89	II-43	RESPONSE OF US to pltf's statement of amount of refund. (ps)
10/10/89	II-44	DECLARATION of Calvin E. Vaubel. (ps)
10/24/89	II-45	MEMORANDUM AND ORDER (PAM, 10/23/89) that plaintiffs shall recover $9,628,293.92 for gift tax and interest erroneously paid, plus $13,119,956.51 in inter-

DATE	NR.	PROCEEDINGS
		est accrued on such amount through September 30, 1989, for a total of $22,748,250.43. Plaintiffs shall- recover interest on the amount set forth in paragraph 1 from September 30, 1989, until the judgment is paid, according to law. cc: attys (ps)
	II-46	JUDGMENT entered (ps)
		CLOSED
12-21-89	II-46	DEFT'S NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE MAGNUSON'S ORDER OF 10-24-89.
		Delivered two certified copies and one uncertified copy of each of the following to the Court of Appeals, St. Paul office: Notice of Appeal, Order of 10-24-89, Judgment and District Court Clerk's Docket Entries. Copy of notice of appeal and docket entries mailed to counsel.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 89-5616MN

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representative of the Estate of Sally O. Irvine, APPELLEES

vs.

UNITED STATES OF AMERICA, APPELLANT

DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
1989	
12-26	DOCKETED appeal.
12-26	CERTIFIED COPIES of notice of appeal, memo/ order and judgment of 10-24-89 and district court docket entries. (1) mjh
12-26	BRIEFING SCHEDULE: meth of appendix prep and Aplnt DR 1-5-90; Aple DR 1-16-90; Transcript 2-5-90; Appendix and Brief of Aplnt 2-15-90; Brief of Aple 3-19-90; Reply Brief 4-2-90.
1990	
Jan. 5	APPEARANCE for appellant. (Allen and Curtis) (2) lmt
Jan. 5	APPEARANCE for appellees. (Martin) (3) lmt
Jan. 5	APPEARANCE for appellees. (Streitz) (4) lmt

DATE	FILINGS-PROCEEDINGS
Jan. 5	APPEARANCE for appellees. (Kyle) (5)lmt
Jan. 5	APPEARANCE for appellees. (Oehler) (6)lmt
Feb. 12	MOTION BY APPELLANT for ext. of time to file brief—GRANTED TO 3/15/90 on 2/13/90. (7)sjo
Feb. 13	APLEE'S OPPOSITION to aplnt's motion for ext. of time. MOOT. sjo
Mar. 19	APPEARANCE for appellant. (Cohen) (8)sjo
Mar. 19	*BRIEF OF APPELLANT & ADDENDUM:* w/ ser 3/15 (31 pages) 7 copies (9)sjo
Apr. 20	*BRIEF OF APPELLEE* w/ser 4/18/90—7 copies (49pgs) (10)lmt
Apr. 20	*ADDENDUM OF APPELLEE* w/ser 4/18/90—7 copies (20pgs) (11)lmt (Cover color)
May 1	MOTION of appellant for an extension of time to file reply brief—MOTION GRANTED to 5/11 on 5/7 (12)dm
May 4	TO SCREENING (MG)
May 7	RETURNED FROM SCREENING—20 min
May 14	*REPLY BRIEF OF APPELLANT:* w/ser 5/11 (14 pages) 7 copies (13)s
August 2	*SET FOR ARGUMENT* SEPTEMBER IN ST. PAUL
Aug. 17	28(j) citation from aplnt. Sent to hearing panel 8/20. sjo
Aug. 31	REQUEST BY APLEES to file supplemental brief. (14)s. To presiding judge by RStV on 9/4.
Aug. 31	Rec'd 11 copies of supplemental brief of aplees. s

DATE	FILINGS-PROCEEDINGS
	Ret'd 11 copies of suppl. briefs to counsel on 9/5. sj
Sept. 5	ORDER: Aplees' request to file a supplemental brief to comment on a decision of the Court of Appeals for the Eleventh Cir. in *Ordway v. United States*, No. 89-5753 (11th Cir. Aug. 10, 1990) has been considered by the Ct. and is denied. (15
Sept. 6	APPEARANCE for appellant. (Cohen) (16)
Sept. 10	ARGUED AND SUBMITTED TO JUDGES MCMILLIAN, BRIGHT & BOWMAN at St. Paul, MN. Counsel for aplnt—Jonathan S. Cohen, DOJ. Counsel for aplee—Phillip H. Martin. No rebuttal. RECORDED. s
1991	
June 10	OPINION BY MCMILLIAN PUBLISHED; SEP/CONCUR. BY BRIGHT; DISSENT BY BOWMAN (17)
June 10	JUDGMENT: The judgment of the district court is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court. (18)
June 14	MOTION for extension of time to file petition for rehearing GRANTED TO AND INCLUDING JULY 8, 1991 on 6-14-91 (19) ema
June 19	OPINION CORRECTION (page 1) lk
July 8	PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC filed by appellees. To Ct. (20) lk
July 16	Response requested. Aplnt. aty requests additional time to file response. Add'l 4 days granted per LP. RESPONSE DUE: 7/30/91 lk

DATE	FILINGS-PROCEEDINGS
July 30	RESPONSE to petition for rehearing—to Ct. (21) mh
Sept. 20	ORDER: Appellees' petition for rehearing with suggestion for rehearing en banc is granted. The opinion and judgment of this court filed June 10, 1991, are hereby vacated. The parties may file supplemental briefs not to exceed fifteen pages within 30 days from the date of this order. This case will be set down for en banc rehearing on Monday, January 6, 1992, at 9:00 a.m. in St. Louis, Missouri. (22) ema
Oct. 3	ORDER: Motion for ext of time to file and serve simultaneous supplement briefs is granted to and including 10/28/91. (23) mam
Oct. 9	RECEIVED 15 additional copies of Brief of Appellee (pldg. #10); fifteen additional copies of Aplee Addendum (pldg. #11) and fifteen additional copies of Appendix for rehearing en banc.
Oct. 11	RECEIVED 15 extra copies of appellant's brf; 15 extra copies of reply brf of appellant. mam
Oct. 30	APPEARANCE OF APPELLANT (McLaughlin) (24) mam
Oct. 30	APPEARANCE OF APPELLANT (Peterson) (25) mam
Oct. 30	SUPPLEMENTAL BRIEF OF APPELLANT (18 copies) (26) mam
Oct. 30	SUPLEMENTAL BRIEF OF APPELLEE (18 copies) (27) mam
Dec. 13	*SET FOR ARGUMENT* January in St. Louis

DATE	FILINGS-PROCEEDINGS
1/6/92	APPEARANCE for appellant, attorney Michael L. Paup [110819] (lad)
1/6/92	RE-ARGUED SUBMITTED EN BANC IN ST. LOUIS TO JUDGES Donald P. Lay, Chief Judge, Myron H. Bright, Senior Judge, Theodore McMillian, Circuit Judge, Richard S. Arnold, Circuit Judge, John R. Gibson, Circuit Judge, George G. Fagg, Circuit Judge, Pasco M. Bowman, Circuit Judge, Roger L. Wollman, Circuit Judge, C. A. Beam, Circuit Judge, James B. Loken, Circuit Judge, David R. Hansen, Circuit Judge Michael L. Paup for Appellant USA, Phillip H. Martin for Appellees First Trust National, Appellees John O. Irvine, Rebuttal by: Mr. Michael L. Paul (DOJ). RECORDED. lad (lad)
12/28/92	THE COURT: Donald P. Lay, Myron H. Bright, Theodore McMillian, Richard S. Arnold, John R. Gibson, George G. Fagg, Pasco M. Bowman, Roger L. Wollman, C. A. Beam, James B. Loken, David R. Hansen OPINION filed by Pasco M. Bowman PUBLISHED [89-5616] [242504] (mjh)
12/28/92	JUDGMENT: Donald P. Lay, Myron H. Bright, Theodore McMillian, Richard S. Arnold, John R. Gibson, George G. Fagg, Pasco M. Bowman, Roger L. Wollman, C. A. Beam, James B. Loken, David R. Hansen: The judgment of the district court is AFFIRMED in accordance with the opinion. [89-5616] [242505] (mjh)
1/11/93	MOTION of aplees John O. Irvine, First Trust Natl. to recover costs. [89-5616] [252759] (mam)
1/27/93	MANDATE ISSUED [89-5616] (rmh)
2/2/93	RECEIPT for Mandate. [89-5616] [256872] (rmh)

DATE	FILINGS-PROCEEDINGS
2/4/93	ORDER filed: granting in part appellee motion recover costs [252759-1] by Appellees John O. Irvine, First Trust Natl. in the amount of $532.60. [89-5616] [258196] (mam)
2/16/93	Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: three copies of cross motions for summary judgment TR. [89-5616] (mgj)
3/31/93	U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 3/23/93. Supreme Ct. Case No.: 92-1546 [89-5616] [280103] (mam)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. Action No. ———

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the Estate of Sally O. Irvine, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed February 4, 1988]

COMPLAINT

Plaintiffs, for their cause of action against Defendant, state and allege as follows:

PARTIES

1. Plaintiff John O. Irvine is an individual who is a resident of White Bear Lake, Ramsey County, Minnesota. Plaintiff First Trust National Association is a national banking corporation incorporated under the laws of the United States and has its principal place of business in Saint Paul, Ramsey County, Minnesota. Plaintiffs are the duly appointed co-personal representatives of the Estate of Sally O. Irvine. An authenticated copy of the order of the Probate Division of the District Court for the Second Judicial District in the State of Minnesota appointing Plaintiffs as co-personal representatives is attached hereto as Exhibit A.

2. Sally O. Irvine was born on December 23, 1910, and died on November 1, 1987. She was a resident of Minnesota for her entire life. Her Taxpayer Identification Number was 472-52-0843.

JURISDICTION

3. This is an action instituted under the Internal Revenue Code of 1986, as amended (the "Code"), for the recovery of Internal Revenue taxes and interest erroneously or illegally assessed against and collected from Sally O. Irvine, and the jurisdiction of this Court is based upon Title 28, United States Code, Section 1346(a)(1).

FACTUAL BACKGROUND

4. On January 16, 1917, Lucius P. Ordway, Sally O. Irvine's grandfather, then of Ramsey County, Minnesota, as settlor, created the "Ordway Trust" by a written trust instrument, and he transferred to the trustees thereof the assets described in said trust instrument, including 38,226 shares of the capital stock of Minnesota Mining & Manufacturing Company ("3M"). A copy of the trust instrument is attached hereto as Exhibit B.

5. The trust instrument creating the Ordway Trust provided that the Ordway Trust was to continue until the death of the survivor of the settlor's wife, Jessie G. Ordway, and his children, John G. Ordway, Samuel G. Ordway, Lucius P. Ordway, Jr., Katharine Ordway, and Richard Ordway. John G. Ordway was Sally O. Irvine's father.

6. Upon the death of the last survivor of the settlor's wife and children, the trust instrument provided for the termination of the trust and the distribution of the trust principal as follows:

> Upon the death of the survivor of my wife and children, and the termination of the aforesaid trust, said trustees shall pay over and transfer the trust

> fund in equal shares to each of my grand children per capita and not per sturpes (sic). If any of my grand children shall then have died leaving issue, said children shall be entitled to equal portions of the share of said deceased grand child.

7. Katherine Ordway, the last to die of the settlor's wife and children, died on June 27, 1979.

8. Upon the death of Katherine Ordway, twelve grandchildren of the settlor Lucius P. Ordway were then living, including Sally O. Irvine, one grandchild of the settlor had died leaving issue (children) then living, and one grandchild of the settlor had died without issue.

9. By reason of the death of Katharine Ordway on June 27, 1979, and Sally O. Irvine's survivorship of Katherine Ordway, Sally O. Irvine became finally ascertained as a remainder beneficiary of the Ordway Trust on June 27, 1979, and her interest then became indefeasibly fixed both in quality and in quantity as a one-thirteenth interest in the then distributable principal of the Ordway Trust.

10. On June 27, 1979, Sally O. Irvine had five children, all of whom were then living, namely Thomas E. Irvine, Jr., Horace H. Irvine, II, John Ordway Irvine, Sally Gilman Irvine Crow, and William Edwin Irvine.

11. On August 20, 1979, Sally O. Irvine executed a written Disclaimer (the "Disclaimer"), which was filed on August 21, 1979, in the District Court of Ramsey County, Minnesota. A certified copy of the Disclaimer was mailed to each of the trustees of the Ordway Trust on August 22, 1979. By the Disclaimer, Sally O. Irvine disclaimed five-sixteenths (31.25 percent) of her one-thirteenth remainder interest in the distributable principal of the Ordway Trust, which then included 8,283,000 shares of the capital stock of 3M. Sally O. Irvine expressly excluded from the operation of her Disclaimer any and all other interests which she had or may have had in

said one-thirteenth interest. A copy of the Disclaimer is attached hereto as Exhibit C.

12. The District Court of Ramsey County, Minnesota, by its Order dated September 6, 1979, after a hearing on September 4, 1979, found that Sally O. Irvine, acting under Minnesota Statutes § 501.211, had validly and timely disclaimed as of June 27, 1979, five-sixteenths (31.25 percent) of her one-thirteenth interest in the principal of the trust estate, *i.e.*, 5/208ths of the entire principal, and that as a result of said disclaimer each of her five children was entitled to 1/208th of the entire principal of the trust estate. A copy of the Order is attached hereto as Exhibit D.

COUNT I

Calendar Quarter Ending September, 1979

13. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 12 of this Complaint as if fully set forth herein.

14. On November 14, 1979, Sally O. Irvine timely filed her United States Quarterly Gift Tax Return (Form 709) for the calendar quarter ending September, 1979, reporting that she had made no taxable gifts during the calendar quarter and showing no tax due. In the return, she reported her disclaimer of 31.25 percent of her one-thirteenth remainder interest in the principal of the Ordway Trust, stated that the disclaimer was not subject to federal gift tax, and attached a copy of the Disclaimer to the return.

15. On March 19, 1982, Calvin E. Vaubel, an estate tax attorney with the Internal Revenue Service, informed Sally O. Irvine's counsel that the Internal Revenue Service had determined that the Disclaimer was a taxable gift for federal gift tax purposes.

16. On the same day (March 19, 1982), Sally O. Irvine filed an amended United States Quarterly Gift Tax Return (Form 709) for the calendar quarter ending Sep-

tember, 1979, reporting the disclaimer of 31.25 percent of her one-thirteenth remainder interest in the Ordway Trust as a taxable gift of 1/208th of the principal of the trust estate to each of her five children and showing tax due of $7,486,671, which she paid on that date.

17. By written notice dated March 31, 1982, from the Internal Revenue Service, Odgen, Utah, Sally O. Irvine was notified of a gift tax assessment dated March 31, 1982, for the tax period ended September 30, 1979, in the amount of $7,486,671, plus interest thereon of $2,086,627.51. She paid the interest on April 9, 1982.

18. On March 15, 1984, Sally O. Irvine filed with the Internal Revenue Service a Claim (Form 843), signed by her on February 14, 1984, for refund of gift taxes for the calendar quarter ending September, 1979, in the amount of $7,486,671, plus interest paid thereon of $2,086,627.51, together with interest on these amounts as provided by law. The Claim was filed within two years after the payment of such taxes and interest and, therefore, was timely filed. A copy of the Claim is attached hereto as Exhibit E.

19. Sally O. Irvine received a legal notice from the Internal Revenue Service dated March 26, 1987, stating that the Claim referred to in paragraph 18 of this Complaint was fully disallowed.

20. Plaintiffs have filed this action within two years of the date of the legal notice of disallowance referred to in paragraph 19 of this Complaint.

21. The Disclaimer by Sally O. Irvine was made pursuant to the provisions of Minnesota Statutes § 501.211, and the Disclaimer was timely, valid, and effective under the law of the State of Minnesota, the law governing the Ordway Trust and the disclaimer of any interest therein by Sally O. Irvine. The Disclaimer is by its terms unequivocal.

22. Sally O. Irvine had not accepted any part of the remainder interest in the Ordway Trust at the time of the

Disclaimer, and by the Disclaimer as authorized by Minnesota Statutes § 501.211, she refused ownership of 31.25 percent of the one-thirteenth remainder interest (being 5/208ths of the entire remainder interest) otherwise distributable to her but for the Disclaimer.

23. The Disclaimer by Sally O. Irvine was not a transfer taxable as a gift under the Code.

24. If it is held that the Disclaimer by Sally O. Irvine was a transfer taxable as a gift under the Code, then application of the gift tax to the Disclaimer would result in an unconstitutional taking of property without due process of law in violation of the Fifth Amendment to the United States Constitution.

25. Defendant, through its agent, has illegally and erroneously assessed against and collected from Sally O. Irvine gift taxes for the calendar quarter ending September, 1979, in the amount of $7,486,671, plus interest paid thereon in an amount of $2,086,627.51. These amounts, together with statutory interest as provided by law, are justly due and legally owing from Defendant to the Estate of Sally O. Irvine.

26. On information and belief, Sally O. Irvine never made any assignment or transfer of this claim, or any portion thereof or interest therein. Plaintiffs, on behalf of the Estate of Sally O. Irvine and all parties interested therein, are the sole owners of this claim and have made no assignment or transfer thereof, or any portion thereof or interest therein.

COUNT II

Calendar Quarter Ending September 1980

27. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 26 of this Complaint as if fully set forth herein.

28. On August 1, 1980, Sally O. Irvine created a charitable remainder annuity trust and transferred cash

in the sum of $120,000 to the First Trust Company of St. Paul as trustee thereof. The transfer of cash to the trustee of said trust constituted a taxable gift to the extent of the value of the income interest under the trust. The income beneficiaries of the income annuity were Louis F. Belland, age 71, and his wife Pearl M. Belland, age 54. Under the trust they were entitled to an annuity of $6,000 per annum payable annually until the death of the survivor of them. The value of the income interest under such an annuity, determined under the applicable Treasury Regulations, was $75,337.

29. On November 12, 1980, Sally O. Irvine timely filed her United States Quarterly Gift Tax Return (Form 709) for the calendar quarter ending September, 1980. In the return, she reported the transfer of $120,000 in cash to said charitable remainder annuity trust and reported a taxable gift thereby of $75,337. She further claimed annual exclusions in connection with the gift in the amount of $3,000 each for each of the two income beneficiaries, resulting in a net taxable gift of $69,337. The return showed total tax of $15,427.62 on the net taxable gift, which was offset entirely by her remaining unified credit against estate and gift taxes. Accordingly, the gift tax return as filed showed no gift tax due.

30. By letter dated June 15, 1982, from Calvin E. Vaubel of the Internal Revenue Service, Sally O. Irvine was advised that the adjustments on her gift tax return for the quarter ending September 30, 1979, would affect the tax payable on the return for the quarter ending September 30, 1980. Enclosed with the letter was a computation of the corrected tax on her return for the quarter ending September 30, 1980.

31. On September 15, 1982, Sally O. Irvine paid additional gift tax for the calendar quarter ending September, 1980, in the amount of $44,035.90, together with interest thereon of $10,959.51, in accordance with

the computation of the corrected tax by the Internal Revenue Service.

32. The adjustments referred to in paragraph 30 of this Complaint were made entirely as a result of the reporting of the Disclaimer as a taxable gift in Sally O. Irvine's amended United States Quarterly Gift Tax Return for the calendar quarter ending September, 1979. These adjustments were an increase in the total taxable gifts for prior periods by the amount of $12,120,530 as reflected in the amended return for the calendar quarter ending September, 1979, and a reduction of the available unified credit for the calendar quarter ending September, 1980, by $38,000, the amount of the unified credit claimed on said amended return.

33. On September 11, 1984, Sally O. Irvine filed with the Internal Revenue Service a Claim (Form 843), signed by her on September 4, 1984, for refund of gift taxes for the calendar quarter ending September, 1980, in the amount of $44,035.90, plus interest paid thereon of $10,959.51, plus statutory interest. The Claim was filed within two years after the date of payment of such taxes and interest and, therefore, was timely filed. A copy of the Claim is attached hereto as Exhibit F.

34. Sally O. Irvine received a legal notice from the Internal Revenue Service dated March 26, 1987, stating that the Claim referred to in paragraph 33 of this Complaint was fully disallowed.

35. Plaintiffs have filed this action within two years of the date of the legal notice of disallowance referred to in paragraph 34 of this Complaint.

36. The Disclaimer by Sally O. Irvine was not a transfer subject to any tax imposed under the Code and therefore the adjustments described in paragraphs 30 and 32 of this Complaint were erroneous.

37. Accordingly, Defendant, through its agent, has illegally and erroneously collected from Sally O. Irvine gift taxes for the calendar quarter ending September,

1980, in the amount of $44,035.90, plus interest paid thereon in the amount of $10,959.51. These amounts, together with statutory interest as provided by law, are justly due and legally owing from Defendant to the Estate of Sally O. Irvine.

38. On information and belief, Sally O. Irvine never made any assignment or transfer of this claim, or any portion thereof or interest therein. Plaintiffs, on behalf of the Estate of Sally O. Irvine and all parties interested therein, are the sole owners of this claim and have made no assignment or transfer thereof, or any portion thereof or interest therein.

COUNT III

Valuation of Disclaimed Remainder Interest

39. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 26 of this Complaint as if fully set forth herein.

40. On Sally O. Irvine's amended United States Quarterly Gift Tax return for the calendar quarter ending September, 1979, described in paragraph 15 of this Complaint, Sally O. Irvine reported the value of the 5/208ths remainder interest in the Ordway Trust (the portion disclaimed by her) to be $12,120,530.

41. The value of the disclaimed remainder interest was not more than $8,498,985, taking all relevant factors into account, including that the disclaimed interest was an indirect rather than a direct interest in the assets of the Ordway Trust, subject to the vicissitudes of administration of the trust, and that the value of the 8,283,008 shares of 3M common stock held by the Ordway Trust reflected in the value of the disclaimed interest as reported (*i.e.*, the mean of the high price and the low price of 3M stock on August 21, 1979) must be discounted substantially to arrive at the correct fair market value of this stock. Thus, the value of the disclaimed remainder interest as reported on Sally O. Irvine's

amended United States Quarterly Gift Tax Return for the calendar quarter ending September, 1979, was overstated to the extent of at least $3,621,545.

42. In the Claim described in paragraph 18 of this Complaint and attached hereto as Exhibit E, Sally O. Irvine included an alternative claim that the value of the disclaimed remainder interest as reported was overstated to the extent of at least $3,621,545. The Claim was timely filed as alleged in paragraph 18 of this Complaint.

43. As alleged in paragraphs 19 and 20 of this Complaint, Sally O. Irvine received a legal notice from the Internal Revenue Service dated March 26, 1987, stating that the Claim described in paragraph 18 of this Complaint was fully disallowed, and Plaintiffs have filed this action within two years of the date of the legal notice of disallowance.

44. If it is determined that the Disclaimer by Sally O. Irvine was a taxable gift and that application of the gift tax to the Disclaimer would not result in an unconstitutional taking of property, then, because the value of the gift was not more than $8,498,985, the gift tax liability of Sally O. Irvine for the calendar quarter ending September, 1979, was not more than $4,951,590, rather than $7,486,671, the amount of gift tax paid.

45. Defendant, through its agent, has illegally and erroneously assessed against and collected from Sally O. Irvine gift taxes for the calendar quarter ending September, 1979, in the amount of not less than $2,535,081, together with interest paid thereon in the amount of not less than $706,552.93. These amounts, together with statutory interest as provided by law, are justly due and legally owing from Defendant to the Estate of Sally O. Irvine.

46. On information and belief, Sally O. Irvine never made any assignment or transfer of this claim, or any portion thereof or interest therein. Plaintiffs, on behalf of

the Estate of Sally O. Irvine and all parties interested therein, are the sole owners of this claim and have made no assignment or other transfer thereof, or any portion thereof or interest therein.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court enter judgment in their favor and against Defendant as follows:

(a) On Count I, recovery of gift taxes paid for the calendar quarter ending September, 1979, in the amount of $7,486,671 plus interest paid thereon in the amount of $2,086,627.51, together with statutory interest as provided by law.

(b) On Count II, recovery of gift taxes paid for the calendar quarter ending September, 1980, in the amount of $44,035.90, plus interest paid thereon in the amount of $10,959.51, together with statutory interest as provided by law.

(c) Alternatively, on Count III, recovery of gift taxes paid for the calendar quarter ending September, 1979, in the amount of not less than $2,535,081, plus interest paid thereon in the amount of not less than $706,552.93, together with statutory interest as provided by law.

(d) Interest, costs, disbursements, and attorneys' fees.

(e) Such other and further relief as the Court may deem appropriate.

Dated: February 4, 1988

DORSEY & WHITNEY

/s/ Philip H. Martin
PHILIP H. MARTIN
FAITH L. OHMAN
2100 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2845/2706

BRIGGS AND MORGAN

/s/ Cole Oehler
COLE OEHLER
RICHARD H. KYLE
2200 First National Bank Building
Saint Paul, Minnesota 55101
Telephone: (612) 291-1215

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-88-61

JOHN O. IRVINE and FIRST TRUST NATIONAL, a national banking corporation, as co-personal representatives of the Estate of Sally O. Irvine, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

UNITED STATES' ANSWER

The United States, by its counsel, answers the plaintiffs' Complaint as follows:

1. At this time lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 1 of the Complaint. Admits the allegations of the third and fourth sentences of the paragraph.

2. As to the allegations of paragraph 2: Currently lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 2. Admits the rest of the allegations of the paragraph.

3. As to the allegations of paragraph 3: Admits that jurisdiction, to the extent it exists, is based upon Section 1346(a)(1) of Title 28, U.S.C. Admits that the action seeks to recover taxes and interest that were assessed and collected, but denies that the assessments were illegal

or erroneous in any way, and denies that it was illegal or erroneous for the Service to collect that tax and interest.

4. Admits the allegations of paragraph 4, but avers that the trust instrument in question transferred those assets to the trustees for the benefit of, *inter alia,* Sally O. Irvine, to whom the trust instrument gave, at the time of the creation of the trust, a contingent remainder interest in the principal of the trust.

5. Admits the allegations of paragraph 5.

6. Admits the allegations of paragraph 6.

7. Admits the allegations of paragraph 7.

8. Admits the allegations of paragraph 8, except lacks knowledge or information sufficient to form a belief as to the issue of grandchildren who had died.

9. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 9, except denies the allegations' implication that Sally O. Irvine was not a remainder beneficiary until she had survived Katharine Ordway.

10. Admits the allegations of paragraph 10.

11. Admits the allegations of paragraph 11, except lacks knowledge or information sufficient to form a belief about the truth of the allegations of the second sentence of the paragraph.

12. Admits the allegations of paragraph 12.

13. Realleges each and every response reflected in paragraphs 1 through 12 of this Answer as if fully set forth herein.

14. Admits the allegations of paragraph 14.

15. Lacks knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 15.

16. Admits the allegations of paragraph 16.

17. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 17. Admits that interest in the amount alleged was paid on or about the date alleged.

18. Admits the allegations of paragraph 18, except denies that Exhibit A attached to the Claim (Exhibit E

to the Complaint), is a true copy of the Exhibit A that actually was attached to the Claim, and except lacks knowledge or information sufficient to form a belief as to whether attachments to Exhibit A are true copies of the items iriginally attached to original Exhibit A.

19. Admits the allegations of paragraph 19.

20. Admits the allegations of paragraph 20.

21. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

22. Denies the allegations of paragraph 22.

23. Denies the allegation of paragraph 23.

24. Denies the allegations of paragraph 24.

25. Denies the allegations of paragraph 25.

26. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 26.

27. Realleges each and every response reflected in paragraphs 1 through 26 of this Answer as if fully set forth herein.

28. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28.

29. As to the allegations of paragraph 29: Admits that the return described was filed on or about the date alleged, and admits that the return as filed showed no gift tax due. Lacks knowledge or information sufficient to form a belief as to the truth of the rest of the allegations of the paragraph.

30. Admits the allegations of paragraph 30, except alleges that the letter in question was sent to Sally O. Irvine's representative, Mr. Cole Oehler, and lacks knowledge or information sufficient to form a belief as to the contents of the computation of corrected tax referred to in the paragraph.

31. Admits the allegations of paragraph 31, except lacks knowledge or information sufficient to form a belief as to the truth of the allegation that it was paid "in accordance with" the Service's computation of corrected tax.

32. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32.

33. Admits the allegations of paragraph 33.

34. Admits the allegations of paragraph 34.

35. Admits the allegations of paragraph 35.

36. Denies the allegations of paragraph 36.

37. Denies the allegations of paragraph 37.

38. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 38.

39. Realleges each and every response reflected in paragraphs 1 through 26 of this Answer as if fully set forth herein.

40. Admits the allegation of paragraph 40.

41. Denies the allegations of paragraph 41.

42. Admits the allegations of paragraph 42.

43. Admits the allegations of paragraph 43.

44. Denies the allegations of paragraph 44.

45. Denies the allegations of paragraph 45.

46. Lacks knowldege or information sufficient to form a belief as to the truth of the allegations of paragraph 46.

47. Denies that plaintiffs, or either of them, are entitled to the relief requested or to any relief whatsoever.

WHEREFORE, the United States requests that this action be dismissed with prejudice, and that costs be awarded to it.

JEROME G. ARNOLD
United States Attorney

/s/ Thomas D. Sykes
THOMAS D. SYKES
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-6322

(Certificate of Service Omitted in Printing)

Lucius P. Ordway Family Tree (Exhibit A to Affi

Lucius Pond Ordway
b. Jan. 21, 1862

d. Jan. 10, 1948

m. Apr. 29, 18

John Gilman Ordway
b. Jan. 20, 1886
d. Jan. 19, 1966

m. Dec. 21, 1909
to
Charlotte Wyman
Partridge
d. Aug. 27, 1974

Samuel Gilman Ordway
b. Jan. 2, 1887
d. May 31, 1942

m. Jan. 17, 1914
to
Mildred Wurtele

Lucius Pond O
b. Dec. 2, 189
d. Mar. 3, 196

m. 191
to
Josephine
d. Nov. 30, 19

m. Oct. 15, 19
to
Kay Dench
divorc

m. Mar. 17, 19
to
Ellen Glen

Sara Prudence (Sally)
b. Dec. 23, 1910
(Mrs. Thomas E. Irvine)
d. Nov. 1, 1987

Katherine (Polly)
b. Apr. 3, 1916
(Mrs. Craig Wallace)

Charlotte Partridge
b. May 27, 1917
(Charlotte S. Wyman)

Helen Partridge
b. May 16, 1920
(Mrs. John C. Wright)

John Gilman, Jr.
b. Nov. 29, 1922

Dorothy
b. Feb. 28, 1916
(Mrs. Charles J. Mills)

Joan
b. Dec. 17, 1918
(Mrs. Richard Tweedy)

Gilman Wurtele
b. May 7, 1925

Peter
b. Feb. 26, 19

John R. G.
b. Oct. 12, 19
d. Jan. 29, 19

Elizabeth
b. July 25, 19
d. Apr. 18, 19
(Mrs. Rich

avit of John G. Ordway, Jr. dated June 23, 1989) (Tr. Doc. II-31)

XHIBIT A

Jessie Gilman
b. Nov. 14, 1864
d. May 28, 1944

dway, Jr.

Katharine Ordway
b. April 3, 1899
d. June 27, 1979

Richard Ordway
b. Mar. 2, 1903
d. Jan. 24, 1976

m. Apr. 7, 1926
to
Glady Watson Ford
d. Feb. 12, 1989

reen

nning Frazer

No children

Gladys Alexandra
b. Apr. 25, 1927
(Mrs. Warren Bjorklund)

Mary Pond
b. Mar. 18, 1929
(Mrs. Ward Johnson)

Robert Ford
b. Mar. 31, 1932
d. Aug. 21, 1953

rd Dunn)

John Gilman Ordway
b. Jan. 20, 1886

d. Jan. 19, 1966

m. Dec. 21

Sara Prudence (Sally)
b. Dec. 23, 1910

m. 1934
Thomas Edward Irvine
d. 1-27-53

Katherine (Polly)
b. Apr. 3, 1916

m. Jan. 8, 1941
to
Craig Wallace
d. Apr. 11, 1987

Charlotte
b. May 26

m. Oct. 15
t
Tassos
(now
S. W

Thomas Edward Irvine, Jr.

b. Nov. 28, 1934

Horace Hills Irvine, Jr.
b. June 1, 1937

John Ordway Irvine

b. Feb. 16, 1941

Sally Gilman Irvine Crow
b. Mar. 26, 1943

William Edwin Irvine
b. July 8, 1948

Jessie Gilman Wallace
Peterson
b. Nov. 2, 1942

George Barclay Wallace
b. July 26, 1944

Charlotte Partridge
Wallace Murray

b. Feb. 18, 1946

Kristina
(also kn
b. Nov. 1

Antonia F
b. Oct. 3,

HIBIT A—Continued

Charlotte Wyman Partridge
b. Oct. 2, 1887

1909

d. Aug. 27, 1974

artridge
1917

Helen Partridge
b. May 16, 1920

John Gilman, Jr.
b. Nov. 29, 1922

1946

m. July 7, 1945
to
John Cushing Wright

m. June 28, 1947
to
Margaret McCarthy

I. Fondaras
ow as Charlotte
man)

ga Fondaras
wn as Tara Lamont)
1949

Charles Ames Wright
b. Dec. 9, 1946

John Gilman Ordway III
b. Mar. 13, 1948

ndaras
953

Edwin Partridge Wright
b. Dec. 25, 1947

Margaret Strand Ordway Quesada
b. Mar. 15, 1950

Stephen Ordway Wright
b. Feb. 25, 1950

Philip Wyman Ordway
b. Feb. 25, 1961

John Anthony Wright
b. Mar. 6, 1956

Lucius P. Ordway Trust created January 16, 1917 (Exhibit L to Affidavit of Mary J. Streitz dated June 21, 1989 (Streitz Affidavit)) (Tr. Doc. II-32)

EXHIBIT L

ORDWAY TRUST

This is a copy of the Ordway Trust Agreement certified to the town by the last item herein by Ella M. Boo.)

I, Lucius P. Ordway for and in consideration of the sum of One ($1.00) Dollar to me in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, transfer and convey unto John G. Ordway, Samuel G. Ordway and Lucius P. Ordway, Jr., their successors and assigns, but in trust nevertheless for the following described uses, intents and purposes, that certain property hereafter described and herein termed the trust fund.

To have and to hold the same, together with all the herediments, and appurtenances thereunto belong from and to any wise appertaining to the said trustees and their successors in trust during the term of the lives of my wife Jessie G. Ordway, and my children John G. Ordway, Samuel G. Ordway, Lucius P. Ordway, Jr., Katharine Ordway and Richard Ordway, and the survivor of them.

Said trustees are hereby authorized and directed to hold and manage said property with power from time to time in their discretion, and upon their unanimous agreement, to sell the same or any part thereof and convert it into money, and to invest the proceeds thereof in such investments as they may deem best. Said trustees are further empowered at any time to lease the whole or any part of the realty comprised in said trust fund, and in their discretion to continue in force existing mortgages, and are hereby empowered to execute good and sufficient deeds and other instruments to so convey, transfer and lease the same. Unless so specifically provided by them said trustees shall not be required to give a bond or other instrument for the performance of said duties.

Said trustees are hereby directed to pay the income of said trust fund as follows:

To my wife Jessie G. Ordway the sum of Fourteen Thousaid Dollars per annum, payable in monthly installments during her life. The balance of the income of said trust fund shall be divided into five equal parts, it being my intention that each of my children shall be entitled to an equal proportion of the income of said trust fund. The shares of each of my adult children, John G. Ordway, Samuel G. Ordway, Lucius P. Ordway, Jr., shall be distributed to them at such times in the course of each year as shall be deemed by said trustees convenient and expedient. From the shares of my minor children, Katherin Ordway and Richard Ordway there shall be paid them, or expended for their account, until they reach the age of twenty-six (26) years, such a sum as in the discretion of said trustees shall be deemed by them necessary and desirable for their proper maintenance, education and support. On attaining said age of twenty-six (26) they shall receive their share of said income as herein provided for my adult children. The balance of the shares of said minor children, after payment of said expenses shall be invested by said trustees for their benefit, and allowed to accumulate, the income from said accumulated amount to be paid them on reaching the age of twenty-one (21), and the principal at best time as said trustee shall in their discretion deem advisable.

Said trustees shall keep proper books of account covering said trust fund property, and shall keep separate books covering the cumulative profit of the minor beneficiaries hereinbefore described.

I hereby provide that on the death of my wife, or on the death of any of my children without issue or husband or wife, the share of my said wife or child shall be distributed in accordance with the terms of this trust agreement to the other beneficiaries herein.

I further provide that on the death of any of my children leaving issue said trustees shall distribute said de-

ceased child's share of the income of the trust fund, two-thirds equally in the children of said deceased and bequeathed to the husband or wife as long as said survivor shall remain unmarried, and that on the remarriage of said surviving husband or wife it shall be within the discretion of said trustees whether to continue said payment or a part thereof to said husband or wife or to pay the total amount to the children of said survivor.

I further provide that if any of my children shall die without issue, but leaving a husband or wife surviving them, said wife shall receive one-half of the said deceased child's share of said income until her remarriage, when the continuation of said payment, or part thereof shall be in the discretion of the trustees hereof: and that said husband shall be paid such part of said income as said trustees in their discretion shall provide. The balance of the income of said deceased child shall be distributed in accordance with the terms hereof to the other beneficiaries herein.

I further provide that said trustees may, if deemed advisable by them, appoint one of their number in whose name as trustee the property in said trust fund, or any part thereof may stand.

I hereby provide that the number of my trustees shall be kept up to three and may by their unanimous agreement signified in writing be increased to four and whenever any vacancy shall occur if ever, that the surviving trustees shall by an instrument appoint a successor and that the title to said trust fund property shall pass to him by the mere fact of appointment.

Upon the * * * * the survivor of my wife and children and the termination of the aforesaid trust, said trustees shall come over and transfer the trust fund in equal shares to each of my grand children and care about not starving. If any of my grand children shall then have died leaving issue, said children shall be titled to equal portions of the share of said deceased grand child.

It is hereby provided that said trustees or the majority of them, may at any time by instrument in writing cancel, revoke and nullify trusts hereby declared, and re-convey said property to the grantor hereof.

The property included in said trust fund and hereby granted and conveyed is as follows:

Lots five (5), six (6), and seven (7), Block forty-five (45), Kittson's Addition to the City of St. Paul.

Lot one (1), Block Ten (10), except the easterly fourteen and one-half (14½) feet, Rice and Irvine's Addition to the City of St. Paul.

Lot two (2), Block ten (10) except the easterly fourteen and one-half (14½) feet, and except the northerly twenty (20) feet, Rice and Irvine's Addition to the City of St. Paul.

The undivided quarter (¼) of the west one-half (½) of Lot three (3), Block ten (10), St. Paul Proper.

All of said lots and blocks being in accordance with plats thereof on file and of record in the office of the Register of Deeds in the County of Ramsey.

That certain claim for thirty-five thousaid six hundred ($35,600.00) Dollars against Reuben Cohen of the City of Winnipeg, Manitoba, secured by mortgage on Lots one (1) and two (2), Block eleven (11) as shown on a plan of survey of part of Lot twenty-five (25) of the Parish of St. Boniface, registered in the Winnipeg Land Titles Office as Plan 249, said lots being in the City of Winnipeg in the Province of Manitoba.

One Hundred (100) shares of preferred stock in the United States Steel Corporation.

Fifty-one (51) shares of the capital stock of the Western Union Telegraph Company.

(Over)

Two (2) shares of the preferred and nine (9) shares of the common capital stock of the Elizabeth and Trenton Railroad Company.

One Hundred (100) shares of the capital stock of the Glory Branch.

Forty (40) shares of the Capital stock of the Provident Loan Society of St. Paul.

Thirteen (13) shares of the capital stock of the Interstate Investment Trustee Company.

Ten (10) shares of preferred capital stock of the Torrington Company.

Ten (10) shares of the preferred capital stock of the Mosler Safe Company.

Eighty-five (85) shares of the capital stock of the Mexican Northern Railroad Company.

Thirty-five hundred two and one-half (3502½), shares of the capital stock of the St. Paul Hotel Company.

One Hundred (100) shares of the common capital stock of the Baltimore & Ohio Railroad Company.

One Hundred (100) shares of the capital stock of the Illinois Central Railroad Company.

Twenty-five (25) shares of the common capital stock of the Minneapolis, St. Paul and Ste. Marie Railway Company.

Two Hundred Thirty-two (232) shares of the capital stock of the Missouri Pacific Railway Company.

Seven Hundred Seventy-five (775) shares of the capital stock of the Northern Pacific Railway Company.

Two Hundred Fifty (250) shares of the capital stock of the Great Northern Railway Company.

Fifteen (15) shares of the second preferred stock of American Malting Company.

Four (4) bonds of the United States Steel Corporation, being known as 10-60 Year 5% Sinking Fund Gold Coupon Bonds.

Thirty-eight Thousand Two Hundred Twenty-six (38,226) shares of the capital stock of the Minnesota Mining & Manufacturing Company.

Certificate of deposit No. 60 for bond of the Northwest Steamship Company.

Four Hundred Two (402) shares of the common capital stock of the E. P. Burton Lumber Company. Thirteen Hundred Seven (1307) shares of the first preferred stock of the E. P. Burton Lumber Company and Eight Hundred Four (804) shares of the second preferred capital stock of the E. P. Burton Lumber Company.

Thirty-seven (37) bonds of the town of Bois Island in the Dominion of Canada.

In witness whereof I have hereunto set my hand and seal this 16th day of January, 1917.

LUCIUS P. ORDWAY

In presence of:

BURT M. KING
C. A. FULLER

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

On this 16th day of January, 1917, before me personally appeared Lucius P. Ordway to be known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

BURT M. KING

(Notarial Seal)

Notary Public Ramsey County, Minn.
My commission expires March 16, 1923

ACCEPTANCE BY TRUSTEES

We, the said trustee above named join herein in token of our acceptance of the trust hereby conferred upon us.

SAMUEL G. ORDWAY
JOHN G. ORDWAY
L.P. ORDWAY, JR.
(Lucius P. Ordway, Jr.)

RESIGNATION OF TRUSTEE OF ORDWAY TRUST

I, Lucius P. Ordway, Jr., hereby tender my resignation as one of the trustees of the Ordway Trust being deed of trust from Lucius P. Ordway, dated January 16, 1917, and hereby consent that Richard Ordway be appointed trustee in my place.

Dated:

January 3, 1934

LUCIUS P. ORDWAY, JR.

APPOINTMENT OF NEW TRUSTEE

We, the undersigned, being the surviving trustees of that certain Deed of Trust of January 16, 1917 known as the Ordway Trust, hereby accept the resignation of Lucius P. Ordway. Jr., as one of the trustees of said Trust, and herewith appoint Richard Ordway as his successor.

JOHN G. ORDWAY
SAMUEL G. ORDWAY

Dated:

January 17, 1934

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Ella M. Boo being duły sworn deposes and says; that the foregoing instrument is a duplication and exact replica of the original instrument herein, and that the names and execution thereof were copied by her from the original, and are correct.

ELLA M. BOO

Subscribed and sworn to before me
this 25th day of January, 1934.

(Notarial Seal)

H. F. HADLER
Notary Public Ramsey Co., Minn.
My commission expires July 24, 1936.

Internal Revenue Service General Counsel Memorandum 27626 (Jan. 15, 1953) (Exhibit O to Streitz Affidavit)

EXHIBIT O

C:BRIEF
A-454559

In re: * * *

JOINT COUNSEL
BUREAL OF INTERNAL REVENUE

NORMAN A. SUGARMAN
Assistant Commisisoner (Technical)

Attention: *Read, Technical Rulings Division*

Reference is made to the proposed ruling letter (IT: AP:CA:STC:CB) addressed to the Internal Revenue Agent in Charge, * * * Such letter, submitted for review, concludes with the statement:

> "It is * * * believed that the Bureau should not continue in the efforts to assert gift tax liability in this case."

While this office is in agreement with the conclusion reached in the proposed letter, it is not in entire agreement with the reasoning used in reaching such conclusion. Accordingly, it is suggested that the proposed letter be revised to read substantially as follows:

> "Reference is made to your letter of March 23, 1951, Bureau letter of August 16, 1951, and your letter of May 26, 1952. A conference was held in this office on July 10, 1952, the alleged donor being represented by * * * and * * *
>
> "During the course of the conference, counsel for the estate submitted memoranda, and an affidavit executed by * * * The affidavit states that the al-

leged donor made the following declaration when the will was read to him on the day it was found:

> "I have got more than I can attend to. I don't want to be worried about settling the estate and I don't want any of * * * property. Do I have to take it?"

"Upon being advised by counsel that he could renounce any and all rights he had under the will, * * * on August 9, 1948, the day after the will was discovered, filed (an instrument of renunciation with the probate court having jurisdiction over the administration of [testator]'s estate). Such document reads as follows:

> 'Whereas * * * late of the county of * * * is dead, leaving a last will and testament dated the 18th day of September 1924, which will named * * as executor; and whereas under the terms of said will the bulk of the estate of said * * * was willed, given and bequeathed unconditionally to * * * and whereas said will was made many years ago and since said time conditions have changed;
>
> "I, the said * * * do hereby renounce my right to qualify as executor under said will in favor of * * * and request you to appoint said * * * as administrator of the estate of * * * with will annexed; and further believing it to be the wishes of my said nephew * * * for his brothers and sisters to eventually inherit his property, I therefore renounce my rights to inherit under said will or to receive any benefits under said will, and I specifically decline and refuse to receive any of the estate of said * * * under said will, to the end that his brothers and sisters may inherit the residue of his estate directly from him just as if he had died intestate as to the residue of his estate that was devised to me, and

I hereby request the court and the administrator to settle the estate of * * * in accordance with the terms of his will except that as to such parts of his estate that I would have inherited shall pass direct to the heirs of * * * just as if he had died intestate as to the residue of his estate, it being my desire and wish that his brothers and sisters shall immediately inherit direct from him all real and personal property, subject only to his specific bequests in total amount of * * * as specifically provided in his will. The consideration for this is my love and affection for my nephews and nieces referred to.

"Witness my hand and seal this 9th day of August 1946.

* * * (SEAL)'

"On August 12, 1946, the appropriate probate court decreed that—

> '* * * so much of said will as left any property to * * * is null and void and of no effect to pass title to any property real or personal or mixed of the estate of * * *' * * *
>
> 'all of said property of * * * except the specific devises of a total amount of * * * shall descend to and be distributed between the heirs at law of * * * just as if said * * * had died intestate as to the residue of his estate.'

"Counsel stated that the alleged donor was an uncle of the decedent * * * that they had been business associates, and that neither left a wife nor children. Counsel submitted, also, a chart showing the heirs of the decedent * * * and those of the alleged donor, their relationship to each heir and the amount inherited. This chart shows eleven persons who were heirs and natural objects of the bounty of both decedent * * * and the alleged donor,

and thus received benefits as a result of the renunciation. There is shown, also, three persons who were the heirs of the decedent * * * but not heirs of the alleged donor. Those persons benefited by the renunciation, of course. There is shown, as well, ten persons who were the heirs of the alleged donor, but not heirs of the decedent * * *. They were the natural objects of the alleged donor's bounty, and because of his renunciation, lost potential interests in property. In other words, this case is not the type wherein a renunciation causes property to pass to the natural objects of the bounty of decedent * * * who are the same natural objects of the bounty of the alleged donor.

"In *Perkins* v. *Isley,* 32 S.E. (2) 568, a North Carolina case, it is held that renunciation of a bequest is not a conveyance requiring the signature of the spouse of the party renouncing. The court said: 'The right to denounce a devise or legacy is a natural one and needs no statutory authorization. An heir at law is the only person, who, by the common law, becomes the owner of land without his own agency or consent. A title by deed or devise requires the assent of the granter or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir. 3 Washburn, 5th Ed.Sec. 4, p. 6.'

"It is therefore believed that the Bureau should not [continue in its efforts to] assert gift tax liability in this case. Such conclusion is founded on principles of law to the effect that the rights in the renounced property here stem from the will, the instrument of transfer, and not from the decedent * * * who renounced, nor from the * * * laws of succession. *Harris* v. *Commissioner,* 346 U.S. 111 (1950); Ianthe B. Hardenberg, *supra.* The object of a renunciation or disclaimer under a will is not to transfer property, but to prevent a particular transfer of property. *In re Myer's Estate,* 238 F.2d 597 (1951). A transfer of property can be made only by an instrument adapted to that purpose. In re Myer's Estate, *supra.* The

estate and gift tax provisions of the Code do not contemplate the taking of testamentary gifts by renunciation. *Brown* v. *Routzahn*, 68 F. (2d) 914, (CA-9, 1953), cert. denied, 290 U.S. 641. The right which the beneficiary holds is the right to accept such bequest or devise or the equal right to reject. *Brown* v. *Routzahn, supra.* When a devisee accepts a devise, his title relates back to the death of the testator, but when there is a renunciation, the devise never takes effect, title never vests in the devisee, and such renunciation is effective as of the date of the death of the testator. *Perkins* v. *Isely, supra.*

"The cases of *William L. Maxwell,* 17 T.C. No. 196 and *Ianthe B. Hardenbergh,* 17 T.C. No. 166, aff'd, 198 F. (2d) 63 (CA-8, 1952) involved instances of renunciation of an inheritance rather than a legacy, bequest, or devise. The question at issue in the *Maxwell* case arose in the state of California as did the question *In re Kalt's Estate,* 108 P. 2d 401, cited in Bureau letter of August 16, 1951. However, the *Kalt* case can be distinguished on its facts, wherein the legatee renounced four years after the decedent's death, and admittedly took such action to defeat claims of his judgment creditors.

"The papers transmitted with your letter of May 26, 1952 are enclosed herewith. There is transmitted, also, the affidavit of * * * four memoranda submitted by counsel, and the chart previously referred to. You are requested to return these enclosures when they have served their purpose in your office."

The administrative file is returned herewith.

/s/ Charles W. Davis
CHARLES W. DAVIS
Chief Counsel
Bureau of Internal Revenue

Internal Revenue Agent in Charge

* * * * *

Dep. Comr. McLarney

* * * * *

Reference is made to your letter of March 23, 1951, Bureau letter of August 16, 1951, and your letter of May 26, 1952. A conference was held in this office on July 10, 1952, the donor being represented by * * * and * * *

The estate submitted several memoranda, also an affidavit of * * *. The affidavit is to the effect that the donor's real reason for the renunciation was, not that he desired the testator's heirs to receive the property, but that he already had more property than he could attend to, did not want to be worried about the estate and did not want any of the testator's property; that his counsel prepared the necessary documents and inserted language not actually necessary. Counsel also stated that the donor was decedent's uncle, that they had been business associates and that neither left any wife or children.

The Maxwell case, 17 T.C. —— No. 169, and the Hardenberg case, 17 T.C. 166, recently affirmed, were instances of renunciation, not of a devise, bequest or legacy, but of an inheritance, which feature was emphasized by the Court. It might be noted that the Maxwell case arose in California from which State arose the Halt case, 106 Pac. (2) 401, cited in Bureau letter of August 16, 1951, which holds contrary to the weight of authority.

It is probable that the question is not one of local law, but Perkins v. Isley, 32 S.W. (2) 523, a North Carolina case holds that a renunciation of a bequest is not a conveyance requiring the signature of the spouse of the party renouncing. The Court said: "The right to renounce a devise or legacy is a natural one and needs no statutory authorization. 'An heir at law is the only person, who, by the common law, becomes the owner of land without

his own agency or consent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir. He cannot disclaim if he would.' 3 Washburn, 5th Ed., Sec. 4, p. 6."

At the conference counsel submitted a chart showing the heirs of the testator and those of the donor, the relationship to each and the amount inherited. This chart shows eleven persons who were heirs of both the testator and donor. They were the natural objects of the bounty of both the testator and the donor and benefitted by the renunciation. There are also shown three persons who were the heirs of the testator but not of the donor and they of course benefited by the renunciation. There are also shown ten persons who were the heirs of the donor but not of the testator. They were the natural objects of the donor's bounty but did not benefit, in fact lost, by the renunciation. In other words, this is not the case as is sometimes found, of the renunciation causing the passing to the natural objects of the parties renouncing.

As you are undoubtedly aware, there are often facts which may be technically immaterial but may have a psychological effect. For example, assume a case where there is a specific bequest to A and residuary bequest to his children. A's renunciation causes his bequest to fall into the residue, thus benefiting the natural objects of his bounty. Assume another case in which as a result of the renunciation the property passes, not to the natural objects of the bounty of the renouncing party, but to the natural objects of the testator's bounty. In the former case the renunciation has much more the appearance of a gift than in the latter case. In this case the renunciation benefits some persons who were the natural objects of the bounty of both parties and some who were the natural objects of only the testator's bounty, and there are some persons who were the natural objects of the donor's bounty but would not benefit but in fact lost as

a result of renunciation. These facts may or may not be material, but very probably would have at least a psychological effect. A case in which the parties benefited by the renunciation are the natural objects of the bounty of the renouncing party, would be a better case to take into court. Also, on the power of appointment theory, there is some question as to whether the renunciation was an exercise or release of the power. The Bureau's case would be stronger had the power been created after the 1942 Act, and the renunciation after May 31, 1951.

It is therefore believed that the Bureau should not continue in its efforts to assert gift tax liability in this case. This is not to be taken as indicating an opinion that the position taken in Bureau letter of August 16, 1951, was incorrect. There is considerable basis for assertion of gift tax liability on three grounds: (1) That, even under general rules and under property law, renunciation is a gift; (2) that, assuming that for general purposes or purposes of property law renunciation is not a gift, it is a gift for Federal gift tax purposes; (3) that renunciation was an exercise of a power of appointment. The only reason for the Bureau's action in this case is that it is believed advisable to wait for a better case to get into Court.

The papers transmitted with your letter of May 26, 1952, are herewith enclosed. There are also transmitted the affidavit of * * * four memoranda submitted by counsel and the chart. You are requested to return these enclosures when they have served their purpose in your office.

Deputy Commissioner

Enclosures

Streitz Affidavit, Paragraph 18, page 5, together with Unnumbered Internal Revenue Service General Counsel Memorandum (May 3, 1956) (Exhibit P to Streitz Affidavit)

18. Attached as Exhibit P is a true and correct copy of an unnumbered G.C.M. (May 3, 1956) obtained by me from the FOIA Reading Room. I have carefully reviewed this G.C.M. and have concluded that the word "not" appears to be missing after the word "would" and before the word "have" in the seventh line of the second paragraph on page one. This seems clear from the fact that the balance of the document indicates that the Internal Revenue Service was considering a change from its policy not to apply gift tax to disclaimers where permitted under local law to a policy that would apply gift tax to disclaimers generally.

* * * * *

Excerpts from Brief of the Commissioner of Internal Revenue in *Kennedy v. Commissioner*, 7th Cir. No. 86-1489, 804 F.2d 1332 (7th Cir. 1986) (Excerpts from Exhibit R to Streitz Affidavit)

* * * * *

As held by the Tax Court, this case is controlled by the recent Supreme Court decision in *Jewett* v. *Commissioner, supra,* and pursuant to the Court's reasoning in *Jewett,* taxpayer's disclaimer was not made "within a reasonable time * * * of the transfer" as required by the Regulation.

The Supreme Court in *Jewett* held that the disclaimer of a contingent interest in a testimentary trust had to be made within a reasonable time from the creation of the trust, which was determined to be the relevant "transfer" for purposes of the Regulation. The Court expressly rejected the argument that the "reasonable time" did not begin to run until the interest became vested and possessory.[3] The Court rested its decision on the determination that the word "transfer" as used in the Regulation "is the basic term used in the gift tax provisions to describe any passage of property without consideration that may have tax consequences." *Jewett, supra* at 311 (emphasis in the original).

Applying the analysis of the Supreme Court in *Jewett* to this case, the relevant "transfer" for determining the timeliness of the disclaimer is the creation of the joint tenancy with right of survivorship. In 1953, when the

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[3] By so doing, the Court resolved a conflict with the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F.2d 57 (1973) which held that "the holder of a vested remainder interest subject to divestiture had a reasonable time after the death of the life beneficiary within which to renounce or disclaim the remainder without tax consequences." *Jewett* v. *Commissioner, supra,* 455 U.S. at 309 n. 6. Specifically, the Court rejected the significance of the fact that "the holder of the remainder interest did not obtain a right to beneficial ownership and control of the property, until the death of the life beneficiary. Ibid.

joint tenancy was created, that transaction was a gift with tax consequences. This Court analyzed the tax consequences in *Lilly* v. *Smith*, 96 F. 2d 341 (1938) cert. denied, 305 U.S. 604 (1938), and found that the purchase of a home as tenants by the entirety, whereby the husband provided the entire consideration, is a gift to the wife and subject to the federal gift tax. This Court reasoned that it is the conveyance to both and not the death of one, that creates the estate which will ripen into a fee simple. Id. at 343. See also *Commissioner* v. Hart, 106 F. 2d 269 (3d Cir. 1939), holding that the act by one spouse in creating a tenancy by the entirety is a transfer of property subject to a gift tax, and *Johnston* v. *Commissioner*, 27 T.C.M. (CCH) 1401, 1408 (1968).[4]

With Section 2515 of the Internal Revenue Code of 1954, Congress provided prospectively that unless the spouse providing the major part of the consideration elects otherwise, a transfer of real property to a tenancy by the entirety or a joint tenancy between husband and wife with right of survivorship will not be regarded as a gift at that time. The relief provided by Section 2515 is prospective only, and applies after January 1, 1955. See Gift Tax Regulation, 25.2515-1(b) (26 C.F.R.).[5]

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[4] A tenancy by the entirety is not subject to unilateral severance, so the survivor is assured of ultimately becoming the full owner unless the parties act jointly to terminate the tenancy. In a joint tenancy with survivorship rights, the estate relevant here, either party can act unilaterally to sever his interest. See Stephens, Maxfield, Lind, *Federal Estate and Gift Taxation*, para. 9.04[1][b] (5th Ed. 1983.) This distinction has been recognized in the gift tax statute, in that a gift in the form of a joint tenancy with right of survivorship was valued at half the value of the property and a tenancy by the entirety was valued based on an actuary table. See Regulations 108, Gift Tax, Sections 86.2 and 86.19(h) (1943). Nevertheless, the gift tax applied to both transfers.

[5] Section 2515 was itself repealed by P.L. 97-34. Sec. 403(c)(3)(B) (Economic Recovery Tax Act of 1981), effective after December 31, 1981.

In this case, the parties stipulated that taxpayer's husband paid the entire consideration for the purchase of the property in 1953. (App. 4, para. 5, 6.) Because Section 2515 did not apply, the purchase of the property was a gift to taxpayer and subject to gift tax.[6] Thus, it was a taxable transfer. Based on the reasoning of *Jewett*, taxpayer should have disclaimed the survivorship interest within a reasonable time of the creation of the joint tenancy. Taxpayer disclaimed the interest in 1979, 26 years after the transfer creating the interest, not within a reasonable time. *Jewett* v. *Comissioner, supra,* at 318-319.

* * * * *

[6] The fact that taxpayer's husband may not have paid the gift tax is irrelevant. *Jewett, supra,* at 311 speaks of transfers that "may have tax consequences." See also H. Rep. No. 1337, 83d Cong., 2d Sess., 94 (1954), acknowledging that many couples have no intention of making a gift by their creation of a tenancy by the entirety nor do they have knowledge that they have done so.

Internal Revenue Service Private Letter Ruling 6612201590A (Dec. 20, 1966) (Exhibit X to Streitz Affidavit)

EXHIBIT X

Citation
6612201590A

2511.00-00
Transfers in General (Gift V. Not a Gift)

December 20, 1966

* * *
* * *

This refers to your letter of September 16, 1966, and prior correspondence, wherein you request a ruling with respect to the Federal gift tax and income tax consequences of a proposed renunciation by the above-named taxpayer of an income interest in a trust, described below, with respect to which she is presently a joint income beneficiary.

You ask whether the proposed disclaimer would be deemed a taxable gift under the provisions of section 2511 of the Internal Revenue Code of 1954. You also ask whether the income accruing to the disclaimed interest should be taxable to her under sections 652 and 662 of the Code.

* * * created an inter vivos spendthrift trust on December 7, 1933. The trust instrument provided for net income of the trust to be paid to the taxpayer's mother, * * * during her life.

Paragraph SECOND(b) of the trust provides, in part, the following:

'Upon the death of said * * * the trustees shall pay in convenient periodic installments not less frequently than quarterly the net income of the trust estate, share and share alike, to the children of said * * * who survive

her and to the issue per stripes of any child who may have predeceased her or not having predeceased her may die before the termination of the trust herein created.'

Under paragraph SECOND(d), the trustor directed that the trust terminate 21 years after the death of the last survivor of the children now living of said * * * and the Trustees shall thereupon divide the principal of the trust estate remaining after all proper charges as herein provided for and pay the same share and share alike among the grandchildren and the issue per stirpes of any deceased grandchild of said * * *

The trustor died on September 27, 1935. * * * died on January 4, 1936, survived by four children, * * * Each of * * * children received a one-quarter share of the trust income following her death.

* * * died on April 17, 1963, and * * * died on March 15, 1964, each survived by adopted sons. The Supreme Court of Pennsylvania held in an opinion entered on * * * (appeal of * * *), that the adopted sons were not entitled to succeed to the respective interest of their adopted fathers. Petition for reargument was denied on June 23, 1966. As a result of this decision, one-half of the income interests of the adopted sons became payable to * * * the taxpayer, and one-half to * * * Upon hearing of the Supreme Court decision, the taxpayer, through her attorneys, advised the trustee that she wished irrevocably and unqualifiedly to refuse to accept * * * income interest provided she could do so under Pennsylvania law. Counsel for the trustee subsequently advised her that she could. You also indicated that the taxpayer never accepted dominion and control over any portion of * * * interest. The trustees have retained all sums accruing with respect to that interest in a reserve account.

Section 2511(a) of the 1954 Code provides, in part, that the gift tax pertains to gifts indirectly made. On the other hand, section 25.2511—1(c) of the Gift Tax Regulations provides that 'Where the law governing the

administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent * * *, a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. * * * In any case where a refusal is purported to relate only to a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law.'

An income beneficiary of a spendthrift trust may renounce a portion of that income interest under the law of Pennsylvania. See Gallagher v. Smith, 223 F.2d 218 (1955).

The trustor expressed his intent to have the income interest of his grandchildren devolve to their issue, we construe the intent of the trustor to provide that any renounced income interest by the grandchildren shall pass to their natural children.

In view of the foregoing, it is held that taxpayer's proposed renunciation will not result in a taxable transfer of the interest for gift tax purposes to her natural children if such renunciation is executed within a reasonable time from the time that she first received notice of her right to the additional income interest. If the proposed renunciation is executed at the present time, the execution would be effected within a reasonable time within the meaning of section 25.2511-1(c) of the regulations. Cf. Kathryn S. Fuller v. Commissioner, 37 T.C. 147 (1951). As indicated above, the taxpayer has not accepted the subject interest at the present time.

Section 652(a) of the Internal Revenue Code provides, in part, that the amount of income for the taxable year required to be distributed currently by a trust shall be included in the gross income of the beneficiary to whom the income is required to be distributed, whether distributed or not.

Section 301.3 of Title 20 of Purdon's Pennsylvania Statutes Annotated permits an income beneficiary of a Pennsylvania spendthrift trust to release or disclaim his right to income from the trust, provided that such released or disclaimed income passes to one or more of the beneficiary's descendants. The trust income proposed to be disclaimed by the taxpayer in the instant case would pass to her children.

Since the proposed disclaimer of trust income by the taxpayer would be effective and irrevocable under local law, the taxpayer would not be required to include in her gross income, under section 652(a) of the Code, the income subsequently accruing to the trust. However, income accrued to the trust which would be distributable to the taxpayer before she makes her disclaimer will be includible in her gross income, notwithstanding, the fact that it is actually paid to her children. Revenue Ruling 61-62, C.B. 1964-1 (Part 1) 221.

Very truly yours,

(Signed) Lester H. Wallace
Acting Chief, Estate and Gift Tax Branch

6612201590A

END OF DOCUMENT

Preamble to notice of proposed rulemaking and Prop. Treas. Reg. § 25.2511-1(c), 22 Fed. Reg. 53, 58 (Jan. 3, 1957) (Excerpts from Exhibit M to Affidavit of Mary J. Streitz dated July 27, 1989 (Tr. Doc. II-35)

[26 CFR (1954) Part 25]

GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

NOTICE OF PROPOSED RULE MAKING

Notice is hereby given, pursuant to the Administrative Procedure Act, approved June 11, 1946, that the regulations set forth in tentative form below are proposed to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury or his delegate. Prior to the final adoption of such regulations, consideration will be given to any data, views, or arguments pertaining thereto which are submitted in writing, in duplicate, to the Commissioner of Internal Revenue, Attention: T:P, Washington 25, D.C., within the period of 30 days from the date of publication of this notice in the FEDERAL REGISTER. The proposed regulations are to be issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

[SEAL]

O. GORDON DELK,
Acting Commissioner,
of Internal Revenue.

The following regulations relating to the gift tax are hereby prescribed under chapter 12 of subtitle B of the Internal Revenue Code of 1954 and under certain sections of subtitle F of the Internal Revenue Code of 1954. The regulations are applicable to gifts made after December 31, 1954:

* * * * *

§ 25.2511-1 *Transfers in general.* * * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does not immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. The renunciation must be unequivocal and effective under local law. A renunciation is a complete and unqualified refusal to accept the property to which one is entitled. There can be no renunciation of property after its acceptance. A renunciation of only a portion of the property is not a complete and unqualified refusal to accept the property to which one is entitled. In the absence of acts to the contrary, the failure to renounce within a reasonable time after learning of the transfer to him will be presumed to constitute an acceptance of the property. If a joint income tax return is filed by a husband and wife for a taxable year, the payment by one spouse of all or part of the income tax liability for such year is not treated as resulting in a transfer which is subject to gift tax. The same rule is applicable to the payment of gift tax for a calendar year in the case of a husband and wife who have consented to have the gifts made considered as made half by each of them in accordance with the provisions of section 2513.

* * * *

TITLE 26—INTERNAL REVENUE

Chapter I—Internal Revenue Service, Department of the Treasury

PART 86—GIFT TAX UNDER CHAPTER 4 OF INTERNAL REVENUE CODE, AS AMENDED

SUPERSEDURE OF PART

CROSS REFERENCE: For supersedure of this part, see Title 26 (1954), Chapter I, Part 25, § 25.01, *infra*.

TITLE 26—INTERNAL REVENUE, 1954

Chapter I—Internal Revenue Service, Department of the Treasury

Subchapter B—Estate and Gift Taxes

[T. D. 6334]

PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

On January 3, 1957, notice of proposed rule making regarding the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B of the Internal Revenue Code of 1954 and under certain sections of subtitle F of the Internal Revenue Code of 1954 was published in the FEDERAL REGISTER (22 F. R. 53). After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the following regulations are hereby adopted. The regulations are applicable to gifts made during the calendar year 1955 and subsequent calendar years:

* * * * *

Preamble to Treasury Decision 6334 and Treas. Reg. § 25.2511-1(c), 23 Fed. Reg. 8904, 8909-10 (Nov. 15, 1958) (Excerpts from Exhibit N to Affidavit of Mary J. Streitz dated July 27, 1989 (Tr. Doc. II-35))

§ 25.2511-1 *Transfers in general.* * * *

* * * * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512—8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable

time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devises shall go to B, the residuary beneficiary), and under the local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C and D.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-88-61

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the Estate of Sally O. Irvine, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

PLAINTIFFS' ANSWERS TO UNITED STATES' INTERROGATORIES TO PLAINTIFF JOHN O. IRVINE AND UNITED STATES' INTERROGATORIES TO PLAINTIFF FIRST TRUST NATIONAL ASSOCIATION

Plaintiffs John O. Irvine and First Trust National Association hereby respond to United States' Interrogatories to Plaintiff John O. Irvine and United States' Interrogatories to Plaintiff First Trust National Association. Plaintiffs have not yet completed either their own internal gathering of facts and documents related to this action or their discovery. Therefore, in responding to the United States' Interrogatories, plaintiffs reserve the right to revise, correct, add to, supplement and clarify any of their responses.

INTERROGATORY NO. 1.01: State plaintiff's contention as to what the proper classification is, for purposes of the law of property prevailing in the State of Minnesota, of the interest that Sally O. Ordway had be-

tween January 17, 1917 and June 26, 1979 in the portion of the principal of the Ordway Trust that is the subject of this action (e.g., whether the interest is a contingent remainder).

ANSWER: Sally O. Irvine had a future interest in a class gift, subject to open and subject to divestiture.

INTERROGATORY NO. 1.02: If plaintiff contends that the interest referred to in the preceding interrogatory is *not* properly classified, for purposes of the law of property prevailing in the State of Minnesota, as a contingent remainder interest at all times during the period referred to in that interrogatory: (A) state in detail the facts upon which that contention is based; (B) state the identity and current location of each person having knowledge of those facts; and (C) provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases that contention.

ANSWER: The statement in the Answer to Interrogatory No. 1.01 is based on the Trust Agreement dated January 16, 1917 and Amendment to Trust Agreement dated July 22, 1943. Certified copies of the Trust Agreement and Amendment are in the custody of the Administrator of the District Court for the Second Judicial District, Ramsey County, Ramsey County Court House, Saint Paul, Minnesota 55101, in District Court File No. 365266, captioned "In the Matter of the Ordway Trust Created by Deed of Trust from Lucius P. Ordway dated January 16, 1917." Plaintiffs will produce copies of the Trust Agreement and Amendment at the offices of Dorsey & Whitney at a mutually convenient time pursuant to Rule 33(c) of the Federal Rules of Civil Procedure in lieu of describing the documents. A copy of the Trust Agreement also is attached to the Complaint as Exhibit B.

INTERROGATORY NO. 1.03: State plaintiff's contention as to what the proper classification is, for purposes of the law of property prevailing in the State of Minnesota, of the interest that Sally O. Irvine had as of June 28, 1979 in the portion of the principal of the Ordway Trust that is the subject of this action (e.g., whether the interest is a fee simple interest).

ANSWER: Sally O. Irvine had an equitable interest, as a trust beneficiary, in an undivided one-thirteenth interest in the trust assets remaining upon the windup of the trust administration.

INTERROGATORY NO. 1.04: If plaiintiff contends that the interest referred to in the immediately preceding interrogatory is *not* properly clasisfied, for purposes of the law of property prevailing in the State of Minnesota, as a fee simple interest: (A) state in detail the facts upon which that contention is based; (B) state the identity and current location of each person having knowledge of those facts; and (C) provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases that contention.

ANSWER: The statement in the Answer to Interrogatory No. 1.03 is based on the Trust Agreement dated January 16, 1917, trustees' accountings for the period after June 27, 1979, and Court Orders entered after June 27, 1979 with respect to this trust in the District Court for the Second Judicial District Ramsey County, File No. 365266, Saint Paul, Minnesota. Certified copies or the originals of these documents are in the custody of the Administrator of the District Court for the Second Judicial District, Ramsey County, Ramsey County Court House, Saint Paul, Minnesota 55101. Plaintiffs have a copy of the Trust Agreement in their custody or control and will produce it at the offices of Dorsey & Whitney at

a mutually convenient time pursuant to Rule 33(c) of the Federal Rules of Civil Procedure in lieu of describing the document. A copy of the Trust Agreement also is attached to the Complaint as Exhibit B. Plaintiffs are continuing to attempt to determine whether they have custody or control of copies of the remaining documents identified in this Answer.

INTERROGATORY NO. 1.05: Describe, by date and amount, each payment made to Sally O. Irvine from the principal or income of the Ordway Trust, and state whether each such payment was derived from principal or income.

ANSWER:

(a) As to principal:

Pursuant to the Trust Agreement dated January 16, 1917, Sally O. Irvine, prior to the death of Katharine Ordway on June 27, 1979, was not entitled to receive any principal from the Ordway Trust. To the best of plaintiffs' information and belief, no principal payments were made to Sally O. Irvine at any itme before September 6, 1979. The only principal payments to Sally O. Irvine of which plaintiffs are aware were those made upon final distribution of the Ordway Trust to the remainderman pursuant to court proceedings to wind up the trust. Payments of principal cash were made to Sally O. Irvine in the amounts of $1,299,501.28 on or about September 6, 1979, and $52,170.91 on or about December 1, 1980. In addition, Sally O. Irvine received the following shares of stock between October 22, 1979 and December 11, 1979:

STOCK	SHARES
Economics Laboratory, Inc.	1,110
International Business Machines Corp.	3,384
Merck & Co., Inc.	687
Minnesota Mining and Manufacturing Company	438,043
Northwest Bancorporation	1,375
St. Paul Companies, Inc.	1,375

STOCK	SHARES
Smithkline Corporation	1,375
Weyerhauser Company	1,322
Xerox Corporation	951

(b) *As to income*:

Plaintiffs object to this aspect of the Interrogatory on the ground that it is unduly burdensome, calls for irrelevant information and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver of these objections, plaintiffs state that Sally O. Irvine was not entitled before January 19, 1966 to receive any distribution of income from the Ordway Trust. To the best of plaintiffs' information and belief, no income payments were made to Sally O. Irvine before January 19, 1966. Two seventy-fifths (2/75th) of the income from the Ordway Trust was paid to Sally O. Irvine from and after the death of her father, John G. Ordway, on January 19, 1966, in accordance with the trust instrument. Sally O. Irvine's share of income increased as of August 27, 1974 as a result of the death of her mother, Charlotte P. Ordway, and remained the same, namely one twenty-fifth (1/25th), until the death of Katharine Ordway on June 27, 1979. As a result of Sally O. Irvine's disclaimer referred to in paragraph 11 of the Complaint, from the death of Katharine Ordway until the winding up of the Ordway Trust was complete, Salley O. Irvine received 68.75% of one-thirteenth of the income from the Ordway Trust.

INTERROGATORY NO. 1.06: State the identity and current location of each person having knowledge of each payment referred to in the immediately preceding interrogatory.

ANSWER: Subject to and without waiver of their objections stated in the Answer to Interrogatory 1.05, plaintiffs state that each of the following persons, who were trustees of the Ordway Trust during the period from

the first date on which Salley O. Irvine became entitled to receive any income from the Trust, January 19, 1966, through the date on which complete distribution of the Ordway Trust was made, have the requisite knowledge for some or all of this period:

(a) John G. Ordway, Jr.
1000 Pioneeer Building
Saint Paul, Minnesota 55101

(b) Harry L. Holtz
1775 Lexington Avenue
Mendota Heights, Minnesota 55120

(c) John G. Ordway, III
73 Tamarack
Mahtomedi, Minnesota 56115

(d) First Trust National Association
(formerly First Trust Company of Saint Paul)
First National Bank Building
P.O. Box 64704
Saint Paul,. Minnesota 55164-0704
Attn: John L. Jerry

Willard J. Patty, Jr., Ernst & Whinney, 1700 World Trade Center, Saint Paul, Minnesota 55101, also has knowlege of such payments for this period.

INTERROGATORY NO. 1.07: Provide a description of, state the nature and current location of, and identify and state the current location of each person who has custody of, each document or record that reflects the amount or date of each payment referred to in Interrogatory No. 1.05, *supra*.

ANSWER: Subject to and without waiver of their objections stated in the Answer to Interrogatory No. 1.05, plaintiffs state that the Administrator of the District Court for the Second Judicial District, Ramsey County, Minnesota, is the custodian of File No. 365266,

captioned "In the Matter of the Ordway Trust Created By Deed of Trust from Lucius P. Ordway dated January 16, 1917," in which may be found original annual or interim accountings of the administration of the Ordway Trust for the period from January 1, 1966 through the date on which final distribution of all trust assets and income was made. John L. Jerry, First Trust National Association, First National Bank Building, P.O. Box 64704, St. Paul, Minnesota 55164-0704, has custody of copies of two of those accountings, for January 1, 1978 to December 31, 1978 and January 1, 1979 to June 27, 1979. Plaintiffs will produce the copies of the two accountings at the offices of Dorsey & Whitney at a mutually convenient time pursuant to Rule 33(c) of the Federal Rules of Civil Procedure in lieu of describing the documents. Plaintiffs are continuing to attempt to determine whether they have custody or control of copies of the remaining accountings.

Plaintiffs object to this Interrogatory to the extent it requires them to locate, identify, and describe documents containing the raw data which are summarized in the annual or interim accountings contained in the Court File referred to above, on the same grounds as those stated in their Answer to Interrogatory No. 1.05.

INTERROGATORY NO. 1.08: State whether plaintiff contends that Sally O. Irvine had not, at least by the time she reached the then-prevailing age of majority, obtained actual knowledge of the fact that the trust instrument in question (see paragraph 6 of the Complaint) provided that she would, if certain contingencies occurred or were met, receive a share of the principal of the Ordway Trust upon that trust's termination.

ANSWER: On the basis of information that plaintiffs have been able to obtain to date, plaintiffs do not make this contention.

INTERROGATORY NO. 1.09: If plaintiff makes the contention referred to in the immediately preceding in-

terrogatory: (A) state in detail the facts upon which that contention is based; (B) state the identity and current location of each person having knowledge of those facts; and, (C) provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases that contention.

ANSWER: Not applicable.

INTERROGATORY NO. 1.10: State in detail plaintiff's contention or contentions as to the reason or reasons why Sally O. Irvine did not execute a disclaimer document of the nature of that described in paragraph 11 of the Complaint during: (A) the decade ending December 31, 1939; (B) the decade ending December 31, 1949; (C) the decade ending December 31, 1959; (D) the decade ending December 31, 1969; or (E) the nine-year period ending December 31, 1978. As to each contention: State in detail the facts upon which it is based; state the identiy and current location of each person having knowledge of those facts; and, provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases the contention.

ANSWER: Plaintiffs object to this Interrogatory on the ground that it calls for irrelevant information, is not reasonably calculated to lead to the discovery of admissible evidence, and, with respect to the decade ending December 31, 1969 and the nine-year period ending December 31, 1978, may call for disclosure of information protected by the attorney-client privilege.

INTERROGATORY NO. 1.11: State the current address of each person identified in paragraph 10 of the Complaint.

ANSWER:

(a) Thomas E. Irvine, Jr.
10495 Hadley Avenue North
White Bear Lake, Minnesota 55110

(b) Horace H. Irvine, II
20 Louisberg Square
Boston, Massachusetts 02108

(c) John O. Irvine
2503 Manitou Island
White Bear Lake, Minnesota 55110

(d) Sally I. Crow
181 Franklin
Denver, Colorado 80218

(e) William E. Irvine
Post Office Box 216
Encampment, Wyoming 82325

INTERROGATORY NO. 1.12: State in detail plaintiff's contention or contentions as to the reason or reasons why the amended United States Quarterly Gift Tax return referred to in paragraph 40 of the Complaint reported the value of the disclaimed property or interest to be $12,120,530 rather than $8,498,985, the value now alleged by plaintiff. As to each contention: State in detail the facts upon which it is based; state the identity and current location of each person having knowledge of those facts; and, provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases the contention.

ANSWER: Plaintiffs contend that the reasons why the amended United States Quarterly Gift Tax return referred to in paragraph 40 of the Complaint reported the value of the disclaimed property or interest to be

$12,120,530 rather than the lower value alleged by plaintiffs in their Complaint are as follows:

1. The taxpayer, Salley O. Irvine, believed (i) that it was essential to stop the running of interest, then accruing at or near record high rates, on any possible deficiency in her gift taxes; (ii) that filing an amended return quickly, paying at least the amount of tax that would be due upon a completely adverse determination on audit, was the best way to curtail the running of such interest; and (iii) that there were grounds to believe, on the merits of the substantive issue of whether her disclaimer constituted a taxable gift, that no gift tax was due and thus that any amount she paid might be recoverable in a refund action, plus interest at the same rate she would have been required to pay had she not paid the possible deficiency;

2. The necessity for acting quickly to stop the running of interest precluded consideration of all relevant valuation factors, including those which resulted in the conclusion that the valuation reported in the amended return had been overstated; and

3. The valuation reported in the amended return was not based on any expert appraisal of the value of the disclaimed property or interest.

All of these contentions are based on the understanding of Sally O. Irvine's legal advisors as to the reasons that Sally O. Irvine reported the value that she did on her amended return.

The identity and current location of the persons having knowledge of the facts upon which these contentions are based are Cole Oehler and Richard H. Kyle, both at Briggs and Morgan, 2200 First National Bank Building, St. Paul, Minnesota 55101.

Plaintiffs do not base these contentions on any documents or records.

INTERROGATORY NO. 1.13: State in detail the facts upon which that allegations in the first sentence of

paragraph 41 of the Complaint are based; state the identity and current location of each person having knowledge of those facts; and, provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases those allegations.

ANSWER: The allegations in the first sentence of paragraph 41 of the Complaint were based on statements made by experts retained in anticipation of litigation. Persons having knowledge of any of these statements and custody of documents and records containing any of these statements are the experts themselves, the undersigned attorneys, and plaintiffs. Plaintiffs object to providing any more detailed response to the Interrogatory, other than to provide information also called for by Interrogatory No. 1.14, on the ground that the Interrogatory calls for information not permitted to be discovered by interrogatory pursuant to Rule 26(b)(4) of the Federal Rules of Civil Procedure. Plaintiffs also object to this Interrogatory to the extent it calls for identification and description of the contents of documents protected by the work product doctrine. As stated in the Answer to Interrogatory No. 1.14, plaintiffs have not yet reached a final decision on who they expect to call as an expert witness at trial. Plaintiffs will supplement their Answer to Interrogatory No. 1.14 after they make their decision.

INTERROGATORY NO. 1.14: State the identity and current location of each person whom plaintiff expects to call as an expert witness at trial. As to each such person: State the substance of the opinions to which he or she is expected to testify, and provide a summary of the grounds for each opinion; state the substance of the facts to which he or she is expected to testify, i.e., state the substance of the facts known to the person in relation to the opinion testimony that the witness is expected to offer.

ANSWER: Plaintiffs have not yet reached a final decision on who they expect to call as an expert witness at trial. Plaintiffs will supplement their response to this Interrogatory after they make their decision.

INTERROGATORY NO. 1.15: Provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record that reflects an assessment, appraisal, or evaluation of the 8,282,008 shares of stock referred to in paragraph 41 of the Complaint, or any fraction or portion of those shares, regardless of the date upon which the assessment, appraisal, or evaluation was done, and regardless of the date to which the assessment, appraisal or evaluation relates.

ANSWER: Plaintiffs object to this Interrogatory to the extent it calls for information about "assessments" on the ground that it is vague.

Plaintiffs object to this Interrogatory to the extent it calls for information about appraisals or evaluations made by experts retained or consulted in anticipation of litigation, other than to provide information also called for by Interrogatory No. 1.14, on the ground that the Interrogatory calls for information not permitted to be discovered by interrogatory pursuant to Rule 26(b)(4) of the Federal Rules of Civil Procedure. Plaintiffs also object to this Interrogatory to the extent it calls for identification and description of the contents of documents protected by the attorney-client privilege and work product doctrine. As stated in their Answer to Interrogatory No. 1.14, plaintiffs will provide the information called for by Interrogatory No. 1.14 as soon as they have decided who they will call to testify as an expert witness at trial.

Subject to and without waiver of these objections, plaintiffs state that there are no appraisals or evaluations of the 8,282,008 shares of stock referred to in paragraph 41 of the Complaint, or any fraction or portion of those

shares, other than appraisals or evaluations made by experts retained or consulted in anticipation of litigation.

Dated: October 5, 1988

As to objections:

DORSEY & WHITNEY

/s/ Phillip H. Martin
PHILLIP H. MARTIN
FAITH L. OHMAN
2100 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2845/2706

BRIGGS AND MORGAN

/s/ Cole Oehler
COLE OEHLER
RICHARD H. KYLE
2200 First National Bank Building
Saint Paul, Minnesota 55101
Telephone: (612) 291-1215
Attorneys for Plaintiffs

(Notary and Verification Omitted in Printing)

Internal Revenue Service General Counsel Memorandum 38958, 1991 I.R.S. G.C.M. Lexis 34 (Sept. 9, 1991) (Appendix C of Supplemental Brief of Appellees John O. Irvine and First Trust National Association filed in the Eighth Circuit Oct. 28, 1991)

1991 IRS GCM LEXIS 34

G.C.M. 39858

"This document is not to be relied upon or otherwise cited as precedent by taxpayers."

SECTION 2518
DISCLAIMERS 2518-0000

ACTION-DOC: No underlying document.

September 9, 1991

REFERENCE: [*1]

CC:EE:TR-45-1352-90
Br5:MLGompertz

TEXT:

Disclaimer of Qualified Plan Benefits and Benefits under an Individual Retirement Account or Individual Retirement Annuity

JOHN E. BURKE

Assistant Commissioner (Employee Plans and Exempt Organizations)

Attention: Director, Employee Plans Technical and Actuarial Division

This memorandum is in response to your memorandum of January 26, 1989, requesting our consideration of issues arising from a disclaimer of benefits under a qualified plan or an individual retirement account pursuant to section 2518 of the Internal Revenue Code.

ISSUES

1. Whether a disclaimer of benefits under a qualified plan constitutes either (A) an assignment or alienation of plan benefits contrary to section 401(a)(13) of the Code and section 206(d) of ERISA [1] or (B) an assignment of income.

2. Whether a disclaimer [*2] of benefits from either an individual retirement account or an individual retirement annuity (IRA) constitutes an assignment of income, and whether such a disclaimer is contrary to sections 408(a)(4) or 408(b)(1) of the Code.

3. Whether the individual disclaiming the benefits or the actual recipient of the benefits under the qualified plan or IRA is taxable under section 691(a) of the Code, relating to income in respect of a decedent, and whether a deduction is allowed under section 691(c) for estate tax.

CONCLUSIONS

1. A disclaimer of qualified plan benefits that satisfies the requirements of state law and section 2518(b) of the Code is neither a prohibited assignment or alienation nor an assignment of income.

2. A disclaimer of benefits from an IRA that satisfies the requirements of state law and section 2518(b) is not an assignment of income. Also, the disclaimer is not contrary to sections 408(a)(4) and 408(b)(1).

3. The actual recipient of the benefits is taxable under section 691(a) and a deduction is allowed under section 691(c).

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[1] The Secretary of the Treasury has the authority, with certain exceptions not here relevant, to issue "regulations, rulings, opinions, variances, and waivers" under section 206 of ERISA (Employee Retirement Income Security Act of 1974). This authority is a result of section 101(a) of Reorganization Plan No. 4 of 1978, 1979-1 C.B. 480.

FACTS

Situation 1

P, a participant in a qualified plan, died prior to separation from service and prior to [*3] the receipt of any benefits under the plan. As a result, P's spouse, B, became entitled to plan benefits under a qualified preretirement survivor annuity because P had not made an election under section 417 to waive the annuity. However, instead of receiving the benefits, B executed a qualified disclaimer satisfying the requirements of state law and of section 2518(b) of the Code. As a result, the benefits that would otherwise have been payable to B become payable to C, a successor or contingent beneficiary.

Situation 2

P established an individual retirement account and an individual retirement annuity (IRAs). Upon P's death, P's interests in the IRAs became payable to B, P's spouse. However, instead of receiving the benefits, B executed a qualified disclaimer satisfying the requirements of state law and of section 2518(b) of the Code. As a result, the benefits that otherwise would have been paid to B became payable to C, a successor or contingent beneficiary.

ANALYSIS

Section 401(a)(13) provides that a trust shall not constitute a qualified trust unless the plan of which such trust is a part provides that benefits provided [*4] under the plan may not be "assigned or alienated." Similar language is contained in section 206(d)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1056(d)(1).

Section 1.401(a)-13(c)(1)(ii) provides that the terms "assignment" and "alienation" include any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or bene-

ficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

Section 401(a)(11) provides, in part, that in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, the accrued benefit must generally be provided in the form of a qualified preretirement survivor annuity. However, under section 417(a), the participant may elect to waive the qualified preretirement survivor annuity form of benefit if the participant's spouse consents in writing to the waiver.

Under section 408(a)(4), the interest of an individual in the balance in his individual retirement account must be nonforfeitable. Under section 408(b)(1), an individual [*5] retirement annuity must be a contract that is not transferable by the owner.

If a person makes a "qualified disclaimer" with respect to any interest in property under section 2518, the estate, gift, and generation skipping transfer tax provisions of the Code (subtitle B) apply with respect to the interest as if the interest had never been transferred to the person making the disclaimer.[2] A "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if four specified requirements are satisfied. Section 2518 is silent with respect to the income tax and ERISA consequences of a qualified disclaimer of an interest in a qualified plan or individual retirement account.

Section 2503(f) provides that if any individual waives, before the death of a participant, any survivor benefit, or right to such benefit, under section 401(a)(11) or 417, such waiver shall not be treated as a transfer of property by gift for purposes of chapter 12 of the Code (gift tax). Section 2503(f) is silent with respect [*6] to the

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[2] For an overview of section 2518, see Gans, Disclaimers, 46 New York University Institute on Federal Taxation 52 (1988).

income tax and ERISA consequences of a waiver or disclaimer, whether before or after the death of the participant.

Sections 401(a)(11) and 417 and the parallel provisions in ERISA (section 205 of ERISA, 29 U.S.C. § 1055) were added by the Retirement Equity Act of 1984 ("REA"), Pub. L. 98-397. In enacting these provisions, Congress wanted to ensure that the participant would not have the exclusive right to determine the form in which benefits are paid under the qualified plan. Congress determined that the spouse ". . . should be involved in making choices with respect to retirement income on which the spouse may also rely. . . ." S. Rep. No. 98-575, p. 12. The policy of giving the spouse an active role, prior to the participant's death, in deciding how retirement benefits are to be paid is entirely consistent with giving the spouse the right to refuse these benefits after the participant's death. There is no evidence that Congress intended to preclude a spouse from disclaiming or renouncing benefits under a qualified plan payable after the participant's death.

Moreover, no inference should be drawn from section 2503(f) that a disclaimer of plan benefits after the participant's [*7] death should receive unfavorable tax treatment simply because Congress provided for favorable gift tax treatment if plan benefits are waived before the participant's death.

At common law, a beneficiary under a will was under no obligation to accept a legacy provided for him by the testator. Newman and Kalter, The Need for Disclaimer Legislation—An Analysis of the Background and Current Law, 28 Tax Lawyer 571 (1975). The beneficiary was permitted to renounce or disclaim the legacy. Detailed rules governing disclaimers are now provided by statute in many states. See also § 2-801 of the Uniform Probate Code. Several state statutes specifically permit a disclaimer of benefits under a pension, profit sharing, or stock bonus plan. For example, see Tex. Prob. Code

Ann. § 37A (Vernon 1987), N.Y. Est. Powers & Trusts Law § 2-1.11 (Consol. 1990), and Ind. Code Ann. § 32-3-2-1 (Burns 1989).

Under the common law, applicable state statutes, and § 2-801(c) of the Uniform Probate Code, a disclaimer operates retroactively, that is, the disclaimer "relates back" to the date of death. See Scott on Trusts, § 36.1 (4th Ed. 1989). The disclaimed property passes as though the disclaimant [*8] predeceased the decedent, and the disclaimed property is regarded as never having vested in the disclaimant. This is consistent with the gift and estate tax treatment provided under section 2518. Because the disclaimant is regarded as never having accepted or received the disclaimed property, the disclaimer is not considered to involve a transfer of property by the disclaimant. See Newman and Kalter, supra, at 571, 572, and 579. (1975). This "no transfer" analysis is reflected in a very early tax case which held that a disclaimer of a legacy was a refusal to accept the property, rather than a transfer of property by the disclaimant in contemplation of death. Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933). Also, the gift tax regulations in effect prior to the enactment of section 2518 (section 25.2511-1(c)) provided that a disclaimer of property acquired from a decedent did not constitute the making of a gift if the disclaimer was unequivocable, timely, and effective under local law:

Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property [*9] transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance.

Creditors of the disclaimant generally have no claim to the disclaimed property and generally cannot compel the disclaimant to revoke the disclaimer and accept the property. A disclaimer by a trust beneficiary is generally effective against creditors even if the beneficiary is insolvent. See Newman and Kalter, supra, p. 597, Scott on Trusts, supra, § 36.1, and Martin, Perspectives on Federal Disclaimer Legislation, 46 Chi. L. Rev. 316, 319, 320 (1979). The rationale is that the disclaimant is regarded as never having owned the disclaimed property and is not considered to have transferred the property to third parties in contravention of creditors' rights. Thus, a federal district court has held that a son's disclaimer [*10] of a legacy under his mother's will was valid, and the property he renounced was not property "belonging to" the son to which a federal tax lien may attach under section 6321. U.S. v. McCracken, 189 F. Supp. 632 (S.D. Ohio 1960). Also, a disclaimer has been held not to constitute a transfer of property by the debtor under the Bankruptcy Code. Hoecker v. United Bank of Boulder, 476 F.2d 838 (10th Cir. 1973). Similarly, Neilsen v. Cass County Social Services Board, 395 N.W.2d 157 (N.D. 1986), held that a disclaimer of an interest in an estate was not a transfer of property by the disclaimant that would disqualify the disclaimant from receiving future medical assistance from the state department of human services.

State statutes[3] and § 2-801(d)(2) of the Uniform Probate Code provide that a beneficiary may disclaim an interest notwithstanding a spendthrift restriction, although such an interest could not be transferred or alienated if it were accepted by the beneficiary. Prior to the enactment of these statutes, it was unclear whether a beneficiary of a spendthrift trust could disclaim the interest. Scott on Trusts, supra, § 337.7 argues in favor of

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[3] See, for example, Ill. Rev. Stat. § 2-7 (1989), Fla. Stat. § 732.801 (7) (1989), and Ind. Code Ann. § 32-3-2-12 (Burns 1989).

permitting [*11] disclaimers by beneficiaries of spendthrift trusts notwithstanding certain court decisions to the contrary. Similarly, Newman and Kalter, supra, state (p. 587), "Denial of the right to disclaim a spendthrift interest would seem to result from a confusion between the legal devices of assignment and disclaimer." (emphasis added) Such "confusion" is no longer present in states having statutes that permit a disclaimer of an interest in a spendthrift trust. There is a clear distinction in these states between a transfer or alienation of a spendthrift interest that has been accepted and a disclaimer of the interest prior to acceptance.

Given the Congressional purpose in ERISA of establishing a nation-wide scheme for regulating employee benefit plans and protecting the interests of plan participants, a uniform federal standard necessarily controls the interpretation of the phrase "assignment or alienation" as used in section 401(a)(13) of the Code and section 206(d) of ERISA. Nevertheless, because the rules governing disclaimers under state law [*12] and section 2518 of the Code are generally consistent with the Congressional purpose underlying sections 401(a)(13) and 206(d), those rules are relevant to the application of the uniform federal standard. We therefore conclude that a disclaimer of benefits under a qualified plan does not constitute a prohibited "assignment or alienation" of plan benefits if the disclaimer satisfies (1) the four requirements of section 2518(b) and (2) the requirements of applicable state law.

No opinion is expressed as to whether a transfer of plan benefits that is not a qualified disclaimer under section 2518(b) is (or may be) a prohibited assignment or alienation. This includes a transfer that fails to qualify under section 2518(b) but which is "treated as" a qualified disclaimer under section 2518(c)(3).

Nor is any opinion expressed as to whether a transfer of plan benefits that was intended to qualify as a disclaimer under state law, but which failed to qualify as

such, is (or may be) a prohibited assignment or alienation.

Situation 1

Consistent with the foregoing, we have concluded in Situation 1 that B's disclaimer of B's interest in the qualified plan does not constitute a transfer [*13] or alienation of the interest in the qualified plan contrary to section 401(a)(13) of the Code and section 206(d) of ERISA. C is regarded as having acquired an interest in the plan from P, not from B.

Moreover, we have concluded in Situation 1 that the benefits under the qualified plan are taxable to C, rather than B. The effect of the disclaimer is that B never became a beneficiary of the qualified plan because the disclaimer "relates back" to the date of P's death. Under section 402(a) of the Code, benefits under a qualified plan are taxable upon actual distribution to the beneficiary. B is not taxable under section 402(a) simply because B would have had a right to receive plan benefits had B not disclaimed. B never became a beneficiary of the qualified plan and no amounts were actually paid or distributed to B. Given the disclaimer, B is deemed never to have been a beneficiary of the qualified plan, and therefore is not taxable under section 402(a). C is taxable on amounts actually distributed from the plan.

Situation 2

The distributee or payee of an individual retirement account or annuity is generally taxable [*14] only on amounts "actually paid or distributed." Section 1.408-4 (a)(1) of the regulations. In Situation 2, C, rather than B, is the payee or distributee, and no amount was actually paid or distributed to B. Therefore, C, rather than B, should be taxed on the benefits from the IRAs.

Moreover, because the effect of the disclaimer is that B never became a beneficiary of the individual retirement

account or annuity, the distribution to C does not violate either section 408(a)(4) or section 408(b)(1) of the Code. B never acquired an interest in the individual retirement account. Therefore, there could be no forfeiture of an interest in the account contrary to section 408(a)(4). Similarly, B never became the owner of the individual retirement annuity. Therefore, there could be no transfer of the annuity by the owner contrary to section 408(b)(1).

Situations 1 and 2

In addition, in Situations 1 and 2, the amounts payable to C constitute income in respect of a decedent under section 691 of the Code. See Rev. Rul. 54-601, 1954-2 C.B. 197, cited with approval in Hess v. Commissioner, 271 F.2d 104 (3d Cir. 1959, rev'g, 31 [*15] T.C. 165 (1958). Because the disclaimer "relates back" to the date of P's death, C, rather than B, is considered "the person who, by reason of the death of the decedent acquires the right to receive . . ." the income in respect of the decedent. C will be entitled to a deduction under section 691(c) for estate tax attributable to the inclusion of the preretirement survivor annuity, or IRA benefits, in P's estate.

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SUPREME COURT OF THE UNITED STATES

No. 92-1546

UNITED STATES, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ORDER ALLOWING CERTIORARI

Filed June 14, 1993

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

June 14, 1993

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